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No. 99-

IN THE

Supreme Court of the United States

THE CHILDREN'S HOSPITAL OF PHILADELPHIA, NAZARETH HOSPITAL and NORBERT FROESE, M.D.,

Petitioners,

v.

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES CUNNINGHAM and MARY ANN CUNNINGHAM, individually; STEPHEN P. and KAREN M. GAULT, as parents and natural guardians of STEPHEN R. GAULT, and STEPHEN P. GAULT and KAREN M. GAULT, individually; BRIAN PECK, a minor, by and through his parents, MARY and KEVIN PECK, and MARY PECK and KEVIN PECK, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a State trial court violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it opens a final un-appealed judgment based solely on the self-serving affidavit and other documents submitted by the losing party's counsel, without affording the judgment winner a hearing in which to present evidence and cross-examine adverse witnesses?

LIST OF PARTIES

Petitioners in this Court are The Children's Hospital of Philadelphia, Nazareth Hospital, and Norbert Froese, M.D., Defendants in the underlying medical malpractice actions.

Respondents are Michael Cunningham, Matthew Cunningham, James Cunningham, Mary Ann Cunningham, Stephen P. Gault, Karen M. Gault, Stephen R. Gault, Brian Peck, Mary Peck, and Kevin Peck, Plaintiffs in the underlying actions.

KRN Associates, Arnold S. Kessler, M.D., David Binder, M.D., S. Bruce Rubin, M.D., Hooshang Nikoo, M.D., Stephen L. Kessler, M.D., William I. Norwood, M.D., Children's Surgical Associates, Ltd., David R. Jobes, M.D., Marshall L. Jacobs, M.D., John D. Murphy, M.D., and Susan T. Nicholson, M.D., Defendants in the underlying actions who have not joined in this Petition, are non-party Respondents in this Court.

STATEMENT PURSUANT TO RULE 29.6

Petitioner The Children's Hospital of Philadelphia is a non-profit Pennsylvania corporation. Its parent company is The Children's Hospital Foundation. Its subsidiary, other than wholly-owned subsidiaries, is the Children's Health Net.

Petitioner Nazareth Hospital is a non-profit Pennsylvania corporation. Its parent company is Catholic Health Initiatives. It has no subsidiaries other than wholly-owned subsidiaries.

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Common Pleas of the First Judicial District of Pennsylvania entered in the consolidated action of *In re Thomas W. Smith, Esquire*, No. 1164, Feb. Term 1998 (Pa. Ct. C.P., Phila. County), on August 20, 1998, in which the Court opened final judgments in *Cunningham v. Nazareth Hospital*, No. 3867, May Term 1995 (Pa. Ct. C.P., Phila. County); *Gault v. The Children's Hospital of Philadelphia*, No. 3971, Oct. Term 1994 (Pa. Ct. C.P., Phila. County); and *Peck v. The Children's Hospital of Philadelphia*, No. 821, July Term 1994 (Pa. Ct. C.P., Phila. County).

OPINIONS BELOW

The opinion of the Court of Common Pleas opening final judgments is unreported and is reproduced in the Appendix at 1a. The opinion of the Court of Common Pleas denying reconsideration but amending its order to provide for interlocutory appeal is unreported and is reproduced at 88a. The orders, without opinion, of the Superior Court of Pennsylvania denying appellate review are unreported and are reproduced at 104a and 107a. The orders, without opinion, of the Supreme Court of Pennsylvania denying discretionary appellate review are unreported and are reproduced at 111a and 115a.

STATEMENT OF JURISDICTION

The orders and opinion of the Court of Common Pleas, granting the Plaintiffs' Petition to Open, without allowing any type of fact-finding proceedings, were entered on August 20, 1998. 1a-87a. By orders and opinion entered on September 18, 1998, the Court of Common Pleas denied

reconsideration but certified its August 20, 1998 order for interlocutory appeal. 88a-103a. Permission to appeal and a precautionary direct appeal were timely sought in the Superior Court of Pennsylvania. Without assuming jurisdiction over the matters, the Superior Court denied all appellate review by orders entered on January 20, 1999. 104a; 107a. Permission to appeal was then timely sought in the Supreme Court of Pennsylvania. The Supreme Court denied all requests for discretionary appellate review by orders entered on October 25, 1999. 111a; 115a. This Petition for a Writ of Certiorari was timely filed in this Court on January 24, 2000.

This Court has jurisdiction to review the final judgment of the Court of Common Pleas, entered in violation of the due process guarantees of the Fourteenth Amendment, pursuant to 28 U.S.C. § 1257. The judgment of the Court of Common Pleas is final because: (1) the constitutional question is a separate and independent matter, unrelated to the legal and factual issues comprising the merits of the state court proceedings; (2) the constitutional question is not subject to further review in the State court proceedings; (3) Petitioners may prevail on the merits of the State court proceedings, causing the constitutional question to evade review; (4) a delay in deciding the constitutional question will work a further deprivation of Petitioners' rights to due process by forcing them to defend themselves in extensive and complex litigation that may prove needless; and (5) a vacation of the order of the Court of Common Pleas, and an evidentiary hearing on the Petition to Open, may end the litigation. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975) (finding jurisdiction under 28 U.S.C. § 1257 to hear appeal from order permitting cause of action for invasion of privacy to go forward); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (finding

jurisdiction under 28 U.S.C. § 1257 to hear appeal from order denying transfer of venue). Because the Pennsylvania appellate courts denied all discretionary review, the Court of Common Pleas is the highest court in Pennsylvania in which review could be had within the meaning of 28 U.S.C. § 1257. *See, e.g.*, *Grovey v. Townsend*, 295 U.S. 45, 47 (1935) (granting certiorari to review judgment of state county court not reviewable in higher state court); *Virginia Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926) (granting certiorari to review judgment of state county court which appellate court declined to review).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution, which provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

On behalf of unsuccessful Plaintiffs in fourteen medical malpractice actions, James E. Beasley, Esquire, filed a joint Petition to Open final un-appealed judgments and other orders entered in favor of the Defendants. The Petition to Open alleged that Mr. Beasley's employee, Thomas E. Smith, Esquire, who was the Plaintiffs' counsel of record in the underlying malpractice actions, had experienced a mental breakdown that caused him to mishandle his clients' cases, including missing deadlines, failing to oppose dispositive motions, and concealing adverse judgments entered against them.

In support of the key factual allegations of the Petition to Open, Mr. Beasley submitted his own self-serving affidavit alleging facts as to which he and/or Mr. Smith alone controlled or possessed the supporting evidence. The Defendants filed a response, denying the factual averments of the Petition to Open. The Defendants also requested discovery and an evidentiary hearing to present evidence and cross-examine adverse witnesses to demonstrate the lack of a factual basis supporting the Petition to Open. The Court of Common Pleas ("Trial Court") summarily denied the Defendants' requests and granted the Petition to Open, accepting as true the Plaintiffs' self-serving factual averments. The Pennsylvania appellate courts refused to review the Trial Court's order.

The sole issue presented in this Petition is whether the most rudimentary and fundamental demands of the Due Process Clause of the Fourteenth Amendment required the Trial Court to permit fact-finding proceedings prior to depriving the Defendants of their undeniable property interests in the final un-appealed judgments entered in their favor.

A. The Underlying Medical Malpractice Actions

Petitioners The Children's Hospital of Philadelphia, Nazareth Hospital, and Dr. Froese (the "Defendants") obtained final judgments in their favor in three of the fourteen underlying actions.[1] In each of the three suits involving the

1. The Defendants obtained final judgments in the underlying cases of *Cunningham v. Nazareth Hospital*, No. 3867, May Term 1995 (Pa. Ct. C.P., Phila. County); *Gault v. The Children's Hospital of Philadelphia*, No. 3971, Oct. Term 1994 (Pa. Ct. C.P., Phila. (Cont'd)

Defendants, Mr. Smith failed to submit an expert report on the Plaintiffs' behalf as required to prove medical malpractice under Pennsylvania law. *See Mitzelfelt v. Kamrin*, 526 Pa. 54, 62, 584 A.2d 888, 891 (1990) (requiring expert testimony to prove breach of requisite standard of care and proximate causation in medical malpractice action). In all three suits, the Trial Court granted summary judgment in favor of the Defendants and terminated the actions. *See* 11a. The Plaintiffs did not appeal from the entry of judgment in these cases.

B. The Petition to Open

In February of 1998, months after the expiration of the applicable appeal periods in these cases, the Plaintiffs filed the Petition to Open, seeking relief on the basis of Mr. Smith's alleged dereliction of his professional duties. Under Pennsylvania law, the Plaintiffs had a heavy burden of establishing a right to such relief: generally, a trial court cannot disturb a final judgment more than thirty days after its entry in an adverse proceeding. *See Klugman v. Gimbel Bros., Inc.*, 198 Pa. Super. 268, 272, 182 A.2d 223, 225 (1962) (refusing to open final judgment for error or oversight of counsel in failing to appeal). Only extraordinary circumstances amounting to fraud or its equivalent justify intervention by the court. 42 PA. C.S. § 5504(b). Where the

(Cont'd)

County); and *Peck v. The Children's Hospital of Philadelphia*, No. 821, July Term 1994 (Pa. Ct. C.P., Phila. County), in the Court of Common Pleas of Philadelphia County. These, along with the eleven other actions, were informally consolidated in the Petition to Open action, separately docketed at *In re Thomas W. Smith, Esquire*, No. 1164, Feb. Term 1998 (Pa. Ct. C.P., Phila. County), and assigned to the Administrative Judge of the Court of Common Pleas of Philadelphia County.

entry of an adverse judgment is attributable to an attorney's conduct, the Pennsylvania Supreme Court has long held that relief from the judgment requires something more than mere neglect or mistake, such as incapacitating illness or active deceit on the part of the attorney. *See Estate of Gasbarini v. Medical Ctr. of Beaver County*, 487 Pa. 266, 270-71, 409 A.2d 343, 345 (1979) (opening final judgment where attorney allegedly representing plaintiff had been suspended from practice of law).

The Plaintiffs supported their contentions with documentary evidence provided by Mr. Beasley: Mr. Beasley's own self-serving affidavit, affidavits of his employees, copies of Mr. Smith's correspondence, and a letter by a psychiatrist who allegedly examined Mr. Smith. *See* 7a-10a. The Petition contained no affidavit or description of the events from Mr. Smith himself.

C. The Contested Facts

The Plaintiffs' Petition to Open rested on highly fact-sensitive arguments based on evidence outside of the record in the underlying actions and within the exclusive control or possession of Mr. Beasley and/or Mr. Smith. The Defendants, without sufficient information to form a belief as to the truth or falsity of the vast majority of the Plaintiffs' factual allegations, filed Answers denying their allegations, thus placing the facts squarely into controversy. *See, e.g., Iacopini v. Plisko*, 412 Pa. 576, 581-82, 195 A.2d 362, 365 (1963) (remanding for resolution of facts put into controversy by petition to open and answer).

In addition, the Defendants filed a Petition for a Scheduling Order, requesting discovery and an evidentiary

hearing in order to challenge the credibility of the affiants, dispute Mr. Smith's psychiatric condition, and contradict the facts averred in the Petition to Open. The Defendants asserted in their Petition for a Scheduling Order that the Pennsylvania Rules of Civil Procedure and the Due Process Clauses of Article 1, § 11 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution required fact finding proceedings.[2]

D. The Trial Court's Orders

The Trial Court did not permit discovery. It did not conduct an evidentiary hearing. Nor did it even permit oral argument on the written submissions. Instead, accepting as true the self-serving facts alleged by the Plaintiffs, the Trial Court summarily granted the Plaintiffs' Petition to Open and denied the Defendants' Petition for a Scheduling Order. 1a-87a. Without discussion, the Trial Court implicitly denied the defendants' Fourteenth Amendment claims. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law. . . .").

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2. Under Pennsylvania law, in a Petition to Open, where the reasons assigned for the removal of the judgment are dehors the record of the judgment, "[t]he appropriate proceeding would have been a petition and rule to open the judgment, a proceeding which would necessarily have involved the taking of testimony to establish the verity of the facts alleged for the removal of the judgment." *Felice Perri and Sons v. Easton Lumber and Builders' Supply Co.*, 412 Pa. 415, 417, 195 A.2d 79, 80 (1963) (discussing difference between petition to strike, challenging judgment based on defects on face of record, and petition to open, challenging judgment for reasons outside of record).

The Defendants sought reconsideration of the Trial Court's order, again asserting their state and federal rights to due process. In the alternative, the Defendants sought certification of the Trial Court's order for interlocutory appeal. The Trial Court denied reconsideration but certified its order for interlocutory appeal. 88a-103a.

E. The Denial of Appellate Review

The Defendants sought permission to appeal in the Superior Court of Pennsylvania, again asserting their state and federal constitutional rights to due process. The Defendants also filed a precautionary direct appeal.[3] Although the Trial Court had certified its order as warranting an interlocutory appeal, the Superior Court refused to exercise its discretion to review the decision. 104a. The Superior Court also quashed the direct appeal. 107a. The Defendants sought discretionary review of the Superior Court's orders, again asserting a denial of their state and federal due process rights, which the Pennsylvania Supreme Court denied. 111a; 115a.

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3. Mr. Beasley commenced a new action by filing the Petition to Open under a separate docket from the underlying cases. Because the underlying cases were not consolidated in the Petition to Open action, the Defendants filed a direct appeal from the Trial Court's order because it effectively terminated the Petition to Open action and was, thus, a final order. After the Trial Court granted the Petition to Open, it consolidated the cases for purposes of appeal.

REASONS FOR GRANTING THE WRIT

"Can it be doubted that due process of law signifies a right to be heard in one's defence?" *Hovey v. Elliott*, 167 U.S. 409, 417 (1897). The question of what process is due in this case is alarmingly elementary. The Trial Court's disregard of the most fundamental concepts of fairness and procedural due process defeats over 100 years of this Court's efforts to protect the due process rights of litigants compelled to defend their property rights in court. A reaffirmation of the right to be heard is imperative.

I. The Trial Court's Denial of Any Evidentiary Proceeding Conflicts with Well-Established Due Process Principles

This Court has held that a final judgment entered in a civil action, whether for failure to state a claim, failure to prove substantive liability, or failure to prosecute, is a form of constitutionally protected property right. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228, 234 (1995); *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898); *see generally Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' "). As property rights, Defendants' judgments entered in the underlying actions are subject to the full guarantees of the Due Process Clause of the Fourteenth Amendment. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of . . . 'property' interests within the meaning of the Due Process Clause. . . .").

Whatever the precise contours of the due process protections ultimately afforded to the Defendants, there is no question that, at a minimum, the Defendants are entitled to the core content of procedural due process: "Parties whose rights are to be affected are entitled to be heard" in their own defense. *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864). *See also Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930) (Brandeis, J.) (reversing a judgment of the Supreme Court of Missouri because it denied to plaintiff "due process of law — using that term in its primary sense of an opportunity to be heard and to defend its substantive right.")

This fundamental procedural due process right to a hearing embraces the right to present evidence, *see Morgan v. United States*, 304 U.S. 1, 18 (1931), and to confront and cross-examine adverse witnesses, *see Green v. McElroy*, 360 U.S. 474, 497 (1959). These rights are particularly applicable where — as here — "credibility and veracity are at issue," and "where important decisions turn on questions of fact;" in such cases, "written submissions are a wholly unsatisfactory basis for decision." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Indeed, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.*

II. The Trial Court's Denial of Any Evidentiary Proceeding Conflicts with the Due Process Decisions of This Court

However broad a state judiciary's control is over the enforcement of the rights of litigants in its courts, a state court may not adopt a procedure that violates the federal constitutional requirements of reasonable notice and an

opportunity to be heard. *See Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931). Thus, this Court has not hesitated to invalidate state trial court action that, like the Trial Court's action here, intrudes upon the core protections of procedural due process.

In *Richards v. Jefferson County*, 517 U.S. 793 (1996), a state court applied res judicata to bar taxpayers' claims based on a prior adjudication to which the taxpayers were not parties. This Court granted certiorari, not to address the merits of the taxpayers' state court action, but to determine the sole question of whether the taxpayers had been afforded due process "in the primary sense." *Richards*, 517 U.S. at 804.

In reversing the judgment, this Court stated:

> While it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Richards, 517 U.S. at 804 (quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-82 (1930)).

In *Armstrong v. Manzo*, 380 U.S. 545 (1965), a state court granted an adoption petition of which the child's biological father had not received notice. The court permitted the father to present evidence at a subsequent hearing on his

motion to annul the decree, after which it affirmed the decree. This Court granted certiorari to review whether the subsequent hearing had cured the constitutional invalidity of the adoption decree entered without notice. This Court ruled that the burden placed on the father of overcoming the adverse decree at the subsequent hearing violated his right to be heard in a meaningful time and in a meaningful manner. *Id.* at 551-52. As this Court explained, only if the trial court had vacated the decree and considered the case anew would it have restored the father to the position he would have occupied had due process of law been accorded to him in the first place. *Id.*

In *Hovey v. Elliott*, 167 U.S. 409 (1897), a state court declined to give effect to a foreign state court's judgment in which the foreign court had struck a defendant's answer and held him in contempt without a hearing. This Court affirmed, concluding:

> To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Hovey, 167 U.S. at 414. As this Court explained in *Hovey*, the denial of a party to the benefit of notice — a reasonable opportunity to be heard — is the same as if he received no notice at all.

As in *Richards* and *Armstrong*, the Defendants are not seeking review of the merits of a state trial court's decision,

but of whether they were afforded due process "in the primary sense." The Trial Court in this case blocked all procedural access for the Defendants to present evidence and challenge the veracity of the Plaintiffs' factual allegations. The Trial Court's action thus violates the basic dictates of procedural due process articulated in *Richards*, *Armstrong*, and *Hovey*. To conclude that a final judgment may be opened without affording the Defendants the opportunity to protect it, "would be like saying to a party, appear and you shall be heard; and when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard." *Hovey*, 167 U.S. at 415.

III. The Protection of the Right to Be Heard Merits the Grant of Certiorari

In a ruling by the Administrative Judge of the largest trial court system in Pennsylvania, the Court of Common Pleas has assumed a power not possessed by any other tribunal in the United States: when rights depend upon facts, the court may disregard all rules of evidence, the right of confrontation, and the safeguard of cross-examination, and arbitrarily render a decision by judicial fiat. The exercise of such authority, even for a sympathetic purpose, is inimical to fundamental concepts of fairness and is prohibited by the United States Constitution.

CONCLUSION

For these reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION AND ORDERS OF THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CIVIL TRIAL DIVISION DATED AUGUST 20, 1998

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

February Term 1998
No. 1164

In re Thomas Smith, Esquire

RELATING TO:

May Term 1995
No. 3867

Cunningham v. KRN Assoc. et al.

October Term 1994
No. 3971

Gault v. Norwood, M.D., et al.

July Term 1994
No. 821

Peck v. Childrens' Hospital of Philadelphia, et al.

Appendix A

October Term 1994
No. 2583

Foody v. Chairman, D.P.M. et al

May Term 1995
No. 4594

Kerwin v. Copley Pharmaceutical, Inc. et al.

April Term 1996
No. 2436

Garner v. The Trustees of the University of Pennsylvania

November Term 1995
No. 1383

Mercer v. Thomas Jefferson University Hospital et al.

November Term 1995
No. 2116

Silverstein v. Ginsberg, D.O. et al.

January Term 1996
No. 0234

Durante v. O'Shea, M.D. et al.

Appendix A

September Term 1996
No. 502

Martino v. Panichelli, et al.

September Term 1994
No. 928

Johnson et al. v. Cristol, M.D.

July Term 1996
No. 1010

Folger v. Dugan, M.D. et al.

October Term 1995
No. 3221

Harris et al. v. Chestnut Hill Hospital et al.

May Term 1994
No. 0964

Joyner et al. v. Patterson, D.O.

Memorandum Opinion and Orders

A. *INTRODUCTION*

Plaintiffs' Petition presents this Court with the novel, unsettling problem of the derailment of fourteen cases involving children and adults who suffered heart-rending,

catastrophic injuries. The dismissals of claims in these cases were allegedly due, *inter alia*, to the professional dereliction, diagnosed debilitating depression, and fraud of their attorney, Thomas Smith, Esquire, who failed either to respond to dispositive motions or to conduct essential discovery.[1] The issues are complicated by the dearth of state precedent. A Third Circuit Court of Appeals case bearing similar facts — which resulted in opening final judgments — was decided under different procedural rules. Moreover, plaintiffs' Petition to restore their right to trial — or a determination on the merits — has prompted varied, complex filings by defendants on such issues as disqualification of James E. Beasley, Esquire, as counsel to Petitioners, procedural objections, and a request for extensive discovery that could extend these proceedings interminably.[2]

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1. The discussion of the conduct of Thomas Smith, Esquire, a member of the Bar of the Supreme Court of Pennsylvania, is necessary to address the legal issues raised by the Petition. However, this Court recognizes that the Supreme Court of Pennsylvania through the Disciplinary Board of the Supreme Court of Pennsylvania has sole and exclusive jurisdiction to determine whether or not an attorney has violated either the Rules of Disciplinary Enforcement or the Rules of Professional Conduct. Nothing contained in this opinion is intended in any way whatsoever to infringe upon that exclusive jurisdiction. *See* Pa. Const. Article V, section 10(c) and Pa.R.D.E. Rule 103.

2. The filings in this case continued until a few days ago. They have all been reviewed, with a realization that the best interests of all parties are served by a prompt ruling. This process was hindered, however, by the submission of ad hominem attacks and a level of rancor in the filings by a few of the counsel involved that ill serves consideration of the serious issues at stake.

Appendix A

Upon consideration of all the filings and the relevant precedent, this Court concludes that the judgments in all of the actions covered by the Petition should be opened and the pretrial discovery extension requests granted for the reasons set forth below. The defendants' motions for disqualification of Mr. Beasley are denied.[3]

1. *Overview of Cases*

In their Omnibus Petition to Open Judgments and Extend Discovery Deadlines in fourteen cases, plaintiffs allege that their attorney, Thomas W. Smith, Esquire, due to recently discovered personal and psychiatric problems, abandoned their cases. Moreover, they assert, in many instances, Mr. Smith fraudulently concealed this wholesale abandonment from them and his colleagues at the Philadelphia law firm of Beasley, Casey and Erbstein (hereinafter "Beasley" firm). As a consequence of this extraordinary dereliction, critical discovery was neglected and summary judgment motions went unanswered, resulting in the entry of final judgments and the dismissal of eight cases: *Cunningham v. KRN Associates*, May 1995, No. 3867; *Gault v. Norwood, M.D. et al.*, October Term 1994, No. 3971; *Peck v. Children's Hospital of Philadelphia*, July Term 1994, No. 821; *Foody v.*

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3. The Court's ruling on the attorney disqualification motions relates solely to the matter of representation on the opening final judgments and related subjects of this opinion. As discussed more fully elsewhere in this opinion, the Court finds that the interests of Attorney Beasley and the Petitioners in the opening and the granting of rights to pretrial discovery coalesced here as one.

Chairman, DPM, et al., October 1994, No. 2583;[4] *Kerwin v. Copley Pharmaceutical, Inc., et al.*, May Term 1995, No. 4594; *Garner v. The Trustees of the University of Pennsylvania, et al.*, April Term 1996, No. 2436;[5] *Mercer v. Thomas Jefferson University Hospital, et al.*, November 1995, No. 1383; and *Silverstein v. Ginsberg, D.O.*, November 1995, No. 2116. In another case where Mr. Smith failed to respond to a summary judgment motion, one defendant was dismissed, but the case is still viable as to the remaining defendant: *Durante v. O'Shea, M.D.*, January 1996, No. 234. Two other cases suffered different fates; *Martino v. Panichelli*, September 1997, No. 502, was dismissed with prejudice for failure to file a complaint. In *Johnson v. Cristol, M.D.*, September 1994, No. 928, a judgment of non pros was entered on January 15, 1998.

In total, plaintiffs allege that in the period between January and November 1997, Mr. Smith failed to respond to 18 summary judgment motions.[6] Attorney Smith's

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4. By order docketed 8/17/96, two defendants in the *Foody* case, Dr. Kenneth Richman and BCRSG Anesthesia Associates, were dismissed by stipulation (Greenspan, J.). Plaintiffs do not seek to reassert any claims against these defendants. Plaintiffs' Reply to Answer of Dr. Richman and BCRSG Anesthesia Associates. re: *Foody*, Memorandum at 1-2.

5. In the *Garner* case, Dr. Leonard Miller was dismissed by stipulation docketed September 2, 1997. Plaintiffs do not seek to reassert a claim as to him. Plaintiffs' Reply to Answer of Dr. Jobes et al. re *Garner* and *Gault* cases, ¶ 19 n.1.

6. *See* Plaintiffs' Petition, ¶ 7. This calculation is based on the motions cited by plaintiffs and the docket entries. If motions in limine

(Cont'd)

abandonment of his cases, plaintiffs allege, went beyond failing to respond to summary judgment motions. He also neglected to pursue the discovery necessary to prepare viable complex cases. Consequently, plaintiffs in three other cases that were not dismissed seek "extraordinary relief" from the discovery deadlines: *Joyner v. Patterson*, May 1994, No. 0964;[7] *Folger v. Dugan*, July 1996, No. 1010; and *Harris v. Chestnut Hill Hospital*, October 1995, No. 3221.

2. *Statement of Facts*

The central figure in the Plaintiffs' Petition is their former attorney, Thomas Smith. They characterize him as an experienced attorney who graduated from law school in 1968, joined a Pittsburgh law firm where he became a partner in 1974. He remained a partner in this firm until June 1985, when he moved to Philadelphia to become a partner in a Philadelphia law firm until 1991. As this firm dissolved, Mr. Smith joined another firm.[8]

(Cont'd)
are included in this computation, Mr. Smith failed to respond to 21 motions. The majority of the motions (17) were filed in October or November 1997; the earliest motion was filed in the *Cunningham* case in January, 1997.

7. By letter dated June 11, 1998, James Beasley, as counsel for plaintiffs, informed this Court that the discovery issues in *Joyner* had been resolved and he was therefore withdrawing this case from the Petition.

8. Plaintiffs' Petition, Memorandum at 4. The source of Smith's "professional biography" is not indicated.

Appendix A

In June 1994, Smith began working as an attorney at the firm of Beasley, Casey, Colleran, Erbstein, Thistle & Kline (a predecessor of Beasley, Casey & Erbstein). He was hired by James E. Beasley, Esquire, who is the "principal and owner,"[9] of the Beasley law firm. In his affidavit, Mr. Beasley states that although clients who seek out the services of the Beasley firm frequently request that he handle their cases personally, "experienced" attorneys such as Mr. Smith were responsible for the "day-to-day" management of cases. Generally, Mr. Beasley became more involved with a case as the trial date approached.[10] Mr. Beasley was under the impression that Mr. Smith was performing his responsibilities satisfactorily; in fact, in 1997 Smith settled two different cases for "sums in excess of $2.5 million dollars each."[11]

According to his affidavit, it was not until Friday evening, January 30, 1998, that Mr. Beasley first learned of the problems with Mr. Smith's cases. On that evening, he was telephoned by Mr. Smith's legal assistant. He then called another attorney in the firm, Slade McLaughlin, to arrange a meeting at the office to assess the extent of the problem. On Saturday morning, Mr. McLaughlin and Mr. Beasley discovered a locked credenza in Mr. Smith's office. After

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9. Affidavit of James E. Beasley, Esquire (2\6\98), ¶ 1-5, Plaintiffs' Petition, Ex. "A" (hereinafter "Beasley Affidavit"). *See also* Affidavit of Slade McLaughlin, Esquire (2\5\98), ¶ 1-5, Plaintiffs' Petition, Ex. "B" (hereinafter "McLaughlin Affidavit").

10. Beasley Affidavit, Plaintiffs' Petition, Ex. "A" at ¶ 6.

11. *Id.* at ¶ 7.

summoning a locksmith to open it, they discovered "piles of unopened mail, Summary Judgment Motions, Preclusion Orders, and other case materials which he had hidden."[12]

Mr. Beasley then called Mr. Smith, who was vacationing in Florida, and asked for an explanation. According to Mr. Beasley's affidavit, Mr. Smith replied that he had a "breakdown." Mr. Beasley "told Mr. Smith that he was fired and I then hung up." He thereafter summoned all the attorneys of the firm to scrutinize Mr. Smith's files and dockets in an effort to evaluate the extent of the problem, which they accomplished by Wednesday, February 3, 1998.[13]

On February 2, 1998, plaintiffs state, Mr. Smith was examined by Wolfram Rieger, M.D., a Clinical Associate Professor of Psychiatry at the University of Pennsylvania. They have attached as an exhibit a copy of a referral letter dated February 3, 1998 by Dr. Rieger to Dr. Gary Gottlieb at Friends Hospital in Philadelphia. In this letter, Dr. Rieger observed:

> Herewith I'm referring to you the above named patient who came to me on an emergency basis with symptoms of an acute major depression.

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12. Beasley Affidavit, ¶ 9-11. Slade McLaughlin in his affidavit likewise describes the credenza as containing legal documents that "had been secreted away rather than placed in the files as would have been appropriate." McLaughlin Affidavit, ¶ 18.

13. Beasley Affidavit, ¶12-14.

Appendix A

The history of the present illness is that Mr. Smith became increasingly depressed during the last year as he experienced anticipatory grief. His mother died in December of 1997 after a long and debilitating illness. He also had other stressors in his life. He owed the IRS a large sum of money. . . .

Within the past year Mr. Smith, in my opinion, as a result of the psychomotor retardation that he experienced as a result of his depression, was not able to function in his law practice as he normally had. According to Mr. Smith, in some of his cases he functioned with his customary expertise and skill. However, in other cases he did not meet the required deadlines and did not do the necessary legwork. There was no rhyme or reason as to why in some cases he fulfilled his obligations and in others he did not. He was able to maintain the facade of a highly competent, capable professional, thus keeping his colleagues and his superior completely in the dark. . . .

Diagnostically, Mr. Smith presently has a major depression, superimposed on bereavement.[14]

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14. Letter dated 2\3\98 from Wolfram Rieger, M.D. to Dr. Gary Gottlieb, Plaintiffs' Petition, Ex. "Y."

Appendix A

B. *LEGAL ANALYSIS*

1. *Introduction: The Variety of Applicable Standards*

As a threshold issue, it is necessary to identify the variety of judgments that are at issue in this Petition so that the appropriate standard of review can be applied. The Petition encompasses summary judgments that have been entered as to all defendants;[15] summary judgment that has been entered as to one defendant, with the action continuing to a remaining defendant[16]; one case dismissed on a judgment of non pros[17]; and one case dismissed with prejudice by court order.[18]

It is well established that judgments entered in a "contested" or "adversarial" proceeding cannot be opened or vacated after they become final. *Simpson v. Allstate Ins. Co.*, 350 Pa. Super. 239, 504 A.2d 335, 337 (1986). The judgments become final within 30 days if no appeal is filed. 42 Pa.C.S.A. § 5505. A narrow exception to the rule against opening final judgments has been recognized, however,

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15. These cases include: (1) *Cunningham v. KRN Associates*; (2) *Gault v. Norwood*; (3) *Peck v. Childrens' Hospital*; (4) *Foody v. Chairman*; (5) *Kerwin v. Copley*; (6) *Garner v. The Trustees of the U. of Pa.* (7) *Mercer v. Thomas Jefferson Univ. Hosp.*; and (8) *Silverstein v. Ginsberg.*

16. *See Durante v. O'Shea*, January Term 1996, No. 0234.

17. *See Johnson v. Cristol*, September Term 1996, No. 502.

18. *See Martino v. Panichelli*, September Term 1996, No. 502.

where there has been "fraud or some other circumstance' so grave or compelling as to constitute "extraordinary cause" justifying intervention by the court'." *Orie v. Stone*, 411 Pa. Super. 481, 601 A.2d 1268, 1270 (1992) (*quoting Simpson, supra*). The authority to grant relief in such instance rests within the sound discretion of the trial court. *Simpson, supra*.

In contrast, a default judgment or judgment by confession can be opened at any time if proper cause is shown. *In the Interest of C.K.*, 369 Pa. Super. 445, 535 A.2d 634, 641, n.3 (1987). Moreover, the Superior Court has observed that "a request to open a judgment of non pros, like the opening of a default judgment, is in the nature of an appeal to the equitable powers of the court. . . ." *Jung v. St. Paul's Parish*, 522 Pa. 167, 560 A.2d 1356, 1358 (1989). In order for the judgment of non pros to be opened, three elements must coalesce:

(1) a petition to open must be promptly filed; (2) there must be a reasonable explanation or excuse for the default; and (3) facts constituting grounds for a cause of action must be alleged. *Lewis v. Reid*, 244 Pa. Super. 76, 366 A.2d 923, 924 (Pa. Super. 1976). Again, the power to grant or refuse the request to open "is peculiarly a matter for the lower court's discretion." *Id.*; *Bildstein v. McGlinn*, 320 Pa. Super. 416, 467 A.2d 601, 602 (Pa. Super. 1983).

Finally, in those cases where summary judgment is entered as to less than all the defendants, the order granting summary judgment is interlocutory. *See e.g. Bonner v. Fayne*, 441 Pa. Super. 432, 657 A.2d 1001, 1002-03 (1995); Pa.R.A.P. 341(c). An interlocutory order is similar to a

default judgment in that it may be modified at any time. As the Superior Court observed, "where the order has not been entered as a judgment or final decree, the trial court has inherent power to reconsider its order even in the absence of fraud or other extraordinary cause." *In the Interest of C.K.*, *supra*, 535 A.2d at 641 n.3.

Plaintiffs argue initially that the less stringent "proper cause" standard should apply to all the uncontested summary judgments at issue in their Petition. They suggest that these summary judgments, "while perhaps technically 'adverse' given the stage of the proceedings at which they were rendered, were rendered in what amounted, essentially, to 'uncontested proceedings.' " Plaintiffs explain that not only did Mr. Smith fail to oppose the summary judgment motions, but his prior abandonment of the cases made it impossible for him to wage a viable defense.[19]

This argument is refuted, however, by the very Pennsylvania Supreme Court case plaintiffs cite as a leading case on the opening of judgments: *Estate of Gasbarini v. Medical Ctr. of Beaver Cty.*, 487 Pa. 266, 409 A.2d 343 (1979).[20] In *Gasbarini*, a complaint was dismissed after plaintiff's counsel failed either to respond to preliminary

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19. Plaintiffs' Petition, Memorandum at 11.

20. For plaintiffs' emphasis on *Gasbarini*, *see*, Plaintiffs' Petition, Memorandum at 14. As defendant CHOP observes, however, the *Gasbarini* Court concluded that the order granting an unopposed preliminary objection at issue in that case fell within the extraordinary cause standard. *See* Answer of Defendant Childrens' Hospital of Philadelphia re: *Peck*, Memorandum at 7.

objections or to attend a hearing. Even though these preliminary objections had been uncontested, the *Gasbarini* Court emphasized the general principle that "an order sustaining the preliminary objections and dismissing the complaint is final and appealable." *Id.*, 409 A.2d at 345. In ultimately ruling that this judgment could be opened, the *Gasbarini* Court applied "the extraordinary cause" standard rather than a "proper cause" standard. *See also*, *Simpson v. Allstate Ins.*, 350 Pa. Super. 239, 504 A.2d 335, 337 (1986) (order entering judgment where counsel failed to comply with discovery order or to oppose motion for sanctions was not a default judgment). The more stringent standard, therefore, must apply to the uncontested summary judgments at issue in the instant petition.

Plaintiffs further argue that four particular cases should be analyzed under the "proper cause" standard.[21] First, they assert that two cases, *Kerwin v. Copley* and *Mercer v. Thomas Jefferson Hospital*, should fall under this standard because final dispositive judgments were not entered in these cases until January 14, 1998. Consequently, they argue, the thirty day limit for reviewing such orders set forth in 42 Pa.C.S.A. § 5505 would not apply, presumably because the Omnibus Petition was filed on February 8. In their subsequent filings, plaintiffs appear to have modified this argument because of the passage of time.[22] This is because it is well established

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21. *See* Plaintiffs' Petition, Memorandum at 10-11 & 13 n.7.

22. *See, e.g.*, Plaintiffs' Reply to the Answer of Defendant Copley Pharmaceutical re: *Kerwin v. Copley Pharmaceutical, Inc. et al.*, Memorandum at 3. Plaintiffs state that since the thirty day (Cont'd)

that even if a party files a petition to open within the thirty day period set forth in 42 Pa.C.S.A. §5505, it is still necessary for the trial court to act within this time period. Once the thirty days elapse, a court loses the unfettered power to rule on it. *Orie v. Stone*, 411 Pa. Super. 481, 601 A.2d 1268, 1271 (1992); *Luckenbaugh v. Shearer*, 362 Pa. Super. 9, 523 A.2d 399, 401 (1987), *app. denied*, 518 Pa. 626, 541 A.2d 1138 (1988). Consequently, the *Kerwin* and *Mercer* cases must likewise be analyzed under the "extraordinary cause" standard.

Plaintiffs finally argue that the "proper cause" standard should apply to *Johnson v. Cristol* and *Martino v. Panichelli* because *Johnson* involved a non pros judgment, while *Martino* was dismissed "by order of discontinuance" for failure to file a complaint. While the proper cause standard would apply to the *Johnson* non pros judgment, the *Martino* case was dismissed with prejudice by court order. It therefore falls within the stricter "extraordinary cause" standard.

There is one case that plaintiffs did not designate in their initial memorandum as falling "incontestably" within the proper cause standard,[23] which does fall within that standard:

(Cont'd)
period from the entering of the dispositive judgment passed without a ruling by the Court, the proper cause standard no longer applies by virtue of the limits under 42 Pa.C.S.A. § 5505. Rather, it is necessary to consider whether the judgment was entered adversely or by default. *Id.* Although this Court is urged nevertheless to treat the matter as falling within the "proper cause" standard, the Court declines to do so.

23. Plaintiffs' Petition, Memorandum at 10 & 13 n.7.

Durante v. O'Shea, January Term 1996, No. 0234. In *Durante*, summary judgment was entered as to one defendant only, so that the order at issue is interlocutory.[24]

With this initial categorization of the various standards applicable to the cases, it is necessary to analyze each case within the appropriate standard and in greater detail.

2. *The "Extraordinary Cause" Standard*

Pennsylvania courts have consistently emphasized that "a judgment entered in an adverse proceeding ordinarily cannot be disturbed after it has become final." *Orie v. Stone*, 411 Pa. Super. 481, 601 A.2d 1268, 1270 (1992), *quoting Simpson v. Allstate Ins. Co.*, 350 Pa. Super. 239, 504 A.2d 335, 337 (1986). The critical rationale for recognizing the finality of judgments is that it establishes "a point at which litigants, counsel and courts ordinarily may regard contested lawsuits as being at an end." *Klugman v. Gimbel Bros.*, 198 Pa. Super. 268, 182 A.2d 223, 225 (1962).

The time limit for determining the finality of judgments is set forth in 42 Pa.C.S.A. § 5505, which provides:

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24. With refreshing directness, Defendant Chestnut Hill Hospital concedes that the proper cause standard applies to *Durante* because summary judgment was entered as to it only and did not thereby terminate the case "so that the order remains within the control of the trial court." *See* Answer of Defendant Chestnut Hill Hospital re: *Durante v. O'Shea*, January 1996, No. 234, Memorandum at 5-6 (citing *Key Automotive Equip. Specialists Inc. v. Abernethy*, 431 Pa. Super. 358, 636 A.2d 1126, 1128 (1994)).

Appendix A

> Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.

Though strict, this statutory time limit is not absolute since the statute itself provides for "Judicial extension of time":

> (a) *General rule* — Except as provided by section 1722(c) (relating to time limitations) or in subsection (b) of this section, the time limited by this chapter shall not be extended by order, rule or otherwise.
>
> (b) *Fraud — The time limited by this chapter may be extended to relieve fraud or its equivalent*, but there shall be no extension of time as a matter of indulgence or with respect to any criminal proceeding. 42 Pa.C.S.A. § 5504(a) and (b) (emphasis added).

This statute became effective June 27, 1978. Subsequent court opinions, in discussing the standards for opening judgments in adverse proceedings, have repeatedly referred to both "fraud" and "extraordinary circumstances" as grounds for opening a final judgment, even where they decided the particular judgment before them could not be opened. In *Orie v. Stone*, *supra*, 601 A.2d at 1270, (1991), the Superior Court observed that "[g]enerally, judgments regularly entered on

adverse proceedings cannot be opened or vacated after they have become final, *unless there has been fraud or some other circumstance 'so grave or compelling as to constitute "extraordinary cause" justifying intervention by the court'.*" This standard was also outlined more recently in *Justice v. Justice*, 471 Pa. Super. 581, 612 A.2d 1354, 1357 (1992), *app. denied*, 533 Pa. 635, 621 A.2d 581 (1993). *See also, Simpson v. Allstate, supra*, 504 A.2d at 337-38; *Klugman v. Gimbel Bros.*, 198 Pa. Super. 268, 182 A.2d 223, 225 (1962). Although the Superior Court in *Justice*, *Simpson*, and *Klugman*[25] did not find the requisite "extraordinary cause" to open the judgments before them, the Pennsylvania Supreme Court did find extraordinary cause to open a judgment in *Gasbarini v. Medical Center of Beaver County, supra*, 409 A.2d 343 (1979) — a case crucial to the present analysis.

Gasbarini, like the Petition at issue, raises the issue of when the dereliction of an attorney constitutes extraordinary cause for opening a judgment adverse to his client. The attorney in *Gasbarini*, Franklin Rubin, represented a widow

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25. In *Justice, supra*, 612 A.2d at 1357, the Court noted that the appellant seeking an untimely opening of her divorce decree to assert economic claims that were omitted inadvertently by her counsel "does not claim any extraordinary cause." In *Simpson, supra*, 504 A.2d at 337-38, the Superior Court concluded that the trial court erred when it opened a judgment entered upon an unopposed discovery sanction motion "without any showing of fraud or extraordinary cause." Finally, in *Klugman, supra*, 182 A.2d at 225, the Superior Court concluded that the trial court erred in allowing an untimely appeal from an arbitration award without a showing of fraud or extraordinary cause: "An error or oversight by counsel in failing to appeal does not constitute 'extraordinary cause'."

who sought to bring an action against the physicians who had treated her deceased husband. In November 1974, he filed a complaint against the defendants, but then failed to respond to preliminary objections. Shortly after receiving the preliminary objections, Rubin was suspended from practice. In January 1975, the preliminary objections were sustained and the complaint dismissed when Rubin failed either to respond to the objections or to attend an oral argument on them. The Court sent a copy of the order dismissing the complaint to plaintiff. Both before and after the judgment, plaintiff inquired about the status of the case and, on those occasions, her attorney assured her that he was providing "proper representation." *Id.*, 409 A.2d 344. Despite these assurances, plaintiff sought new counsel which she obtained in July 1975 "after numerous unsuccessful attempts." Meanwhile, in May 1975, Rubin was disbarred. *Id.*, 409 A.2d at 345.

Plaintiff's new counsel filed a petition to reinstate the complaint and to amend the caption. On January 29, 1976, the trial court ordered that the original judgment in favor of the defendants should be opened. The Superior Court reversed, but on appeal the Supreme Court concluded that the trial court properly opened the judgment, observing that "[w]here equity demands, the power of the court to open and set aside its judgments may extend well beyond the term in which the judgment is entered." *Id.* More specifically, it emphasized:

> We can perceive no greater equitable considerations requiring opening of a judgment than the fact that the attorney allegedly

> representing appellant had been suspended from the practice of law prior to the hearing at which appellee's preliminary objections had been sustained and appellant's complaint dismissed. *Further, appellant's attorney never notified appellant of his suspension*. Under these circumstances, it would be harsh, indeed, to hold that appellants' possible cause of action be lost forever because of the conduct of an attorney this Court has deemed unfit for the practice of law in this Commonwealth. *Id.* (emphasis added).

Defendants argue, however, that *Gasbarini* is not controlling because it was not specifically interpreting 42 Pa.C.S.A. §§ 5504 and 5505. These statutes, they emphasize, became effective in 1978 while the *Gasbarini* Court was focused on facts that occurred in 1975 — several years prior to the statutes' effective dates. Defendants argue that in enacting these statutes, the legislature placed "much greater limitations on the ability of a trial court to modify a judgment or final order after the passage of thirty days than recognized by Pennsylvania courts prior to the enactment of those statutes."[26] This argument is unconvincing. As plaintiffs emphasize, *Gasbarini* remains controlling law. It has been cited in cases decided after the effective dates of sections 5504 and 5505. *See, e.g., Vanleer v. Lerner*, 384

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26. *See, e.g.*, Answer of Defendants KRN Associates, Kessler, Bind, Rubin, Hooshank Nikoo, and Kessler re: *Cunningham*, Memorandum at 18-19. *See also* Answer of Defendant Phillip Ginsberg re: *Silverstein*, Memorandum at 8-9. Defendants do not cite any legislative history to support their interpretation and this Court, likewise, was unable to unearth any.

Pa. Super. 558, 559 A.2d 577, 579 (1989); *In the Interest of C.K., supra*, 535 A.2d at 639-40; *Del Boring Tire Service, Inc. v. Barr Machine*, 285 Pa. Super. 66, 426 A.2d 1143, 1145 n.1 (1981).

Moreover, as the prior discussion of *Justice*, *Orie*, and *Simpson* noted, the Superior Court's recent decisions on opening judgments after thirty days consistently set forth a general standard that encompasses the existence of fraud "or some other circumstance 'so grave or compelling as to constitute "extraordinary cause" justifying intervention by the court'." *Justice*, *supra*, 612 A.2d at 1357. Extraordinary cause, therefore, must be considered as a basis for opening a final judgment. The more difficult question is arriving at a definition of fraud and extraordinary cause for the purpose of opening a final adversarial judgment.

The existence of fraud is a central concern because both the statute and *Gasbarini* recognize it as a basis for extending the time for opening a judgment. Although the defendants argue that it was the attorney's disbarment that was critical to the finding of "extraordinary cause" in *Gasbarini*, there was also attorney fraud towards his client: the attorney failed to inform his client of his suspension and disbarment when he assured her that he could provide proper representation. The Superior Court in *In the Interest of C.K., supra*, 535 A.2d at 640, emphasized how this interplay of suspension, disbarment and attorney\client fraud figured into the *Gasbarini* court's finding of extraordinary cause:

> The Court [in *Gasbarini*] concluded that the fact that appellant's attorney had been suspended and

> could not represent her in connection with the preliminary objections that were ultimately granted, *coupled with the fact that her attorney had misrepresented to her that he was representing her, constituted sufficient equitable grounds to allow the judgment to be opened.* (emphasis added).

Plaintiffs in the instant Omnibus Petition point to and document numerous instances in which Mr. Smith failed to inform them of key aspects regarding his representation of their cases. In *Cunningham v. KRN Associates*, a case brought on behalf of twin brain damaged babies allegedly injured due to obstetrical negligence, summary judgment was entered in favor of the defendants based on uncontested motions by orders docketed on March 5 and May 1, 1997. Nonetheless, nearly seven months later, Mr. Smith met with the Cunninghams and referral counsel to discuss the possibility of a $2.2 million settlement as documented by this letter dated November 6, 1997 from referral counsel to Mr. Smith:

> Dear Tom:
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> Thank you for taking the time to meet with the Cunninghams and me on Tuesday, November 4. As you know, I spent significant time with them after our meeting in order to focus their interests and wishes in this case. Pursuant to our conversations, and after they have had time to consider, Mr. and Mrs. Cunningham have authorized me to advise you that they are willing

to accept $2.4 million to settle the case, under the following conditions.[27]

In *Gault v. Norwood*, a medical malpractice action brought on behalf of a brain injured baby, summary judgment was entered in favor of defendants by orders docketed December 18, 29 and 31, 1997 based on summary judgment motions. However, in a letter dated January 22, 1998, Mr. Smith informed the Gaults that a stay had been entered in all cases in which a party was insured by the PIC insurance group. He then went on to assure them that "[y]ou should not despair nor think that your case will not go forward."[28]

Peck v. Children's Hospital is another case involving uncontested summary judgment motions and active deceit by Mr. Smith against his clients. In *Peck*, a medical malpractice action brought on behalf of a child claiming injuries as a result of cardiothoracic surgery, dispositive summary judgment was entered on behalf of the defendants by virtue of orders docketed on December 9 and 19, 1997. Nonetheless, a little more than one month later, the Pecks also received a letter from Smith dated January 23, 1998 informing them of the PIC stay and assuring them "not to despair nor think that your case will not go forward."[29]

This same pattern of professional dereliction and deceit continued in the case of *Foody v. Chairman*. Although this

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27. *See* Plaintiffs' Petition, Memorandum at 4-5 & Ex. "E."

28. Plaintiffs' Petition, Memorandum at 5-6 & Ex. "G."

29. Plaintiffs' Petition, Memorandum at 6-8 & Ex. "J."

podiatric malpractice action was dismissed by summary judgment orders docketed on September 23 and December 29, 1997, Smith wrote to the Foodys on January 26, 1998 and stated that "[p]er my telephone discussion with John on Friday, January 23rd, your case has been postponed. I expect that it will be rescheduled for the spring, likely late April or May."[30] Although plaintiffs do not present similar documented active fraud in the four other cases that were dismissed by dispositive summary judgment — *Kerwin*, *Garner*, *Mercer*, and *Silverstein* — that may be because dispositive orders were entered so late in these cases. In *Kerwin* and *Mercer*[31] the summary judgment orders were

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30. Plaintiffs' Petition, Memorandum at 8 & Ex. "L."

31. Defendants in *Mercer* concede that summary judgment was entered in this case on January 14, 1998 due to plaintiffs' "failure to produce expert testimony necessary to support his claims of medical malpractice against the defendants in *Mercer*." They argue, however, that Mr. Smith did not abandon this case since he conducted depositions of two defendant physicians in September 1997. They also argue that since plaintiffs state that they learned of this judgment by February 1998, they should have been able to file a timely appeal and have cited no fraud or extraordinary cause that prevented them from doing so. Answer of Defendant Thomas Jefferson University Hospital re: *Mercer*, Memorandum at 1-3. Plaintiffs address this issue most directly in their reply to defendants in the *Kerwin* case. *See* Plaintiffs' Reply to Defendant Copley Pharmaceutical re: *Kerwin*, Memorandum at 3, n.1. They argue that prior to appealing the summary judgments entered in January, 1998 it was necessary to seek review by the trial court because here plaintiffs are not alleging error by the court — the usual grounds for appeal. Rather, they argue that the judgment was entered due to Mr. Smith's abandonment of his cases which is not an appellate issue until it has been ruled on by a trial court.

docketed January 14, 1998. The *Silverstein* orders were not docketed until November 25, 1997 and December 5, 1997, while the final summary judgment order in *Garner* was docketed November 7, 1997. Nonetheless, plaintiffs assert Mr. Smith did not inform either his clients or his colleagues of these adverse rulings. Plaintiffs' Petition, Memorandum at 9-11.

The Supreme Court in *Gasbarini* emphasized that "[w]here equity demands, the power of the court to open and set aside its judgments may extend well beyond the term in which the judgment is entered." *Gasbarini, supra*, 409 A.2d at 345. The defendants, likewise, concede that petitions to open judgments go to the conscience of the Court.[32] As the Supreme Court observed, "[a] petition to open a judgment is an appeal to the equitable side of the court, and the petition must establish equitable considerations which convince the court that justice would best be served by the striking of the judgment." *Thorn v. Clearfield Borough*, 420 Pa. 584, 218 A.2d 298, 298-99 (1966).

Defendants raise various arguments as to why this case does not fall within the "extraordinary cause" standard embraced by *Gasbarini*.

First, they seek to distinguish *Gasbarini* on the grounds that it is fraud prior to the judgment rather than after the

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32. *See* Answer of Defendant John D. Murphy, M.D. re: *Peck v. Childrens' Hospital et al.*, Memorandum at 12 ("A request to open judgment is directed to the conscience of the Court and, as such, the Court is required to balance the equities of each case and to consider the hardship or prejudice to opponents to the petition to open").

judgment that is significant.[33] In so doing, they cite *Lewis v. Reid*, 244 Pa. Super. 76, 366 A.2d 923 (1975), *aff'd*, 244 Pa. Super. 599, 371 A.2d 872 (1976), but offer scant explanation of its relevance to the fraud issue other than a quixotic parenthetical: "petitioning party must explain both lack of diligence in prosecuting action and delay in filing petition to open judgment."[34] While this is undoubtedly an accurate presentation of the standard for opening a judgment of non pros — which was at issue in *Lewis* — it does not address the criteria for establishing the extraordinary cause set forth in *Gasbarini* or the relevance, if any, of fraud.

It is true that the attorney in *Gasbarini* was suspended prior to the hearing on the preliminary objections that he failed to attend. Nonetheless, the Court made it clear that he actively misinformed his client as to his ability to provide "proper representation" both prior to and after the adverse judgment against her:

> *Both Prior* to the January 31, 1975 court order *and subsequent thereto*, appellant and her son made numerous contacts with Rubin to ascertain the status of the case. In all instances, Rubin assured the Gasbarinis that he was providing proper representation. *Gasbarini*, *supra*, 409 A.2d at 344.

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33. *See, e.g.*, Answer of Defendants CHOP and Dr. Froese re: *Gault*, Memorandum at 13. *See also* Answer of Defendant Nazareth Hospital re: *Cunningham*, Memorandum at 13.

34. Answer of Defendants CHOP and Dr. Froese re: *Gault*, Memorandum at 13. *See also* Answer of Defendant Nazareth Hospital re: *Cunningham*, Memorandum at 13.

Admittedly, the attorney in *Gasbarini* did not deceive his client about the entry of the judgment; this would not have been possible because, as the Supreme Court emphasized, the trial court sent the notice of dismissal directly to the plaintiff. *Gasbarini, supra*, 409 A.2d at 344.

In the instant case, Mr. Smith's pattern of deception concerning the status of his cases prevented timely action to open the respective judgments within the statutory thirty days.[35] The Supreme Court in *Gasbarini* concluded, when considering Rubin's concealed suspension from law, that it involved "much more than neglect." *Id.*, 409 A.2d at 343. This Court is persuaded that the same observation applies to the concerted pattern of professional dereliction and fraud in the instant case. The fraud here also suggests that counsel's failure to oppose the summary judgment motions was not a deliberate decision as to the merits of the claim. Moreover, the fact the overall conduct took place in such a concentrated period of time is suggestive of real crisis, buttressed by the medical diagnosis of debilitating depression.

Defendants[36] also cite *Lewis* to support the proposition that it is necessary to show that Mr. Smith was incapacitated

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35. Fraud, obviously, is but one of the factors justifying the opening of the judgments in this Petition. In those cases (*Kerwin* and *Mercer*) where summary judgments docketed on January 14, 1998 were still appealable when plaintiffs discovered Mr. Smith's pattern of dereliction, plaintiffs convincingly establish that this attorney's failure to conduct essential discovery rendered them incapable of establishing to an appellate court that summary judgment had been entered due to trial court error. These cases thus also fall within the pattern of dereliction outlined in the Petition.

36. *See, e.g.*, Answer of Defendants CHOP and Dr. Froese re: *Gault*, Memorandum at 10-11. *See also* Answer of Defendant Nazareth Hospital re: *Cunningham*, Memorandum at 11-12.

by his depression or psychiatric problems to establish extraordinary cause. *Lewis*, however, is inapposite for various reasons. First, it is a non pros case where the Court was obliged to consider whether the three prong test for opening a judgment of non pros had been satisfied:

> (1) a petition to open must be promptly filed;
>
> (2) there must be a reasonable explanation or excuse for the default; and
>
> (3) facts constituting grounds for a cause of action must be alleged. *Lewis*, 366 A.2d at 924.

The attorney in *Lewis*, *supra*, had waited more than 4 years to file a petition to open a non pros judgment that been entered against his client. The *Lewis* Court concluded that this long delay did not satisfy the first prong for opening a non pros judgment. It also concluded that the attorney's explanation for the delay did not satisfy the second prong. *Id.*, 366 A.2d at 925. The reason the attorney gave for this delay — as well as for his failure to answer the interrogatories that caused the non pros to be entered — was severe emotional and marital distress that had persisted for nearly 8 years. The Court found this explanation insufficient in view of the fact that the attorney continued during the span of those 8 years to maintain an active law practice and had failed to advise his clients of his problems or refer them to other counsel. *Id.*, 366 A.2d at 925-27.

The facts presented in the instant petition, however, differ significantly. First, as noted previously, Mr. Smith's professional dereliction spans a much more concentrated time period that can be characterized as crisis. The majority of the adverse rulings, for instance, occurred within months of the filing of the petition to open. The petition to open, thus, was much more timely than the petition in *Lewis*. In addition, since a critical aspect of Mr. Smith's dereliction was a pattern of deceit directed towards his colleagues as to the true status of the cases at issue in this petition,[37] including the secreting away in a locked credenza pleadings and correspondence ordinarily placed in appropriate case files, his failure to refer cases to other firm counsel is of a type of active deceit more akin to that found in *Gasparini*.

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37. Plaintiffs assert that Mr. Smith concealed the true negative status of his cases from his colleagues. For instance, in response to a September 18, 1997 e-mail sent by Mr. Beasley inquiring as to the status of his cases, Mr. Smith in a memo dated October 6, 1997 indicated that the *Cunningham* case was "awaiting trial date," when, in fact, it had been dismissed by court orders docketed March 5, 1997 and May 1, 1997. He also indicated that the *Martino* case was "in suit, awaiting review," when it had been dismissed by order docketed July 31, 1997. *See* Beasley Affidavit, ¶8, referencing Memo from TWS (10\6\97), Plaintiffs' Petition, Ex. A.

Plaintiffs also produce a memo dated January 21, 1998 from "TWS" listing his "PIC" cases. A handwritten note "Trial Phil" followed the name of the *Gault* case even though it had been dismissed by orders docketed December 18, 29, and 31, 1997. Likewise, the *Peck* case was followed by a handwritten note "Trial Phil" even though it had been dismissed by orders docketed December 9 and 19, 1997. Plaintiffs' Petition, Ex. "H."

Moreover, *Lewis* does not stand for the proposition that only complete incapacitation suffices for the opening of a judgment as defendants argue. The *Lewis* Court, for instance, cited approvingly *Thorn v. Clearfield*, 420 Pa. 584, 218 A.2d 298 (1966), a case which did not require as a prerequisite for opening a judgment of non pros the complete incapacitation of an admittedly grievously ill attorney. In *Thorn*, where a judgment of non pros was entered for failure to file a complaint, the Pennsylvania Supreme Court concluded that the judgment could be opened even where an attorney "did in fact perform *some* professional duties during the period from the time he was ruled to file the complaint and the time judgment of non pros was entered, he was not physically capable of performing *all* of his tasks, and it would appear that his work suffered during this period." *Thorn*, *supra*, 218 A.2d at 299 (emphasis added).[38]

Thus, defendants' precedent on this point does not establish that Dr. Rieger's report, indicating that Mr. Smith was not completely incapacitated, is fatal to a showing of extraordinary cause. Not insignificant is Dr. Rieger's reference to Mr. Smith's deceitful ability "to maintain the facade of a highly competent, capable professional, . . ."

Defendants also invoke cases involving *nunc pro tunc* appeals to minimize the implications of the fraud in this case, emphasizing that a focus of fraud or deceit upon the Court, not upon the client as pivotal. *See, e.g.*, *Hentz v. Pennsylvania State Police*, 85 Pa. Cmwlth. 358, 481 A.2d 998 (1984) and

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38. *Thorn* also is remarkable — despite its relatively old vintage — for its recognition of the havoc that extreme emotional distress can reek on professional performance.

Appendix A

Hughes v. Pennsylvania State Police, 152 Pa. Cmwlth. 409, 619 A.2d 390 (1992), *app. denied*, 536 Pa. 633, 637 A.2d 293 (1993).[39] As plaintiffs rightly point out, however, these cases rest on a narrower standard applicable to *nunc pro tunc* appeals analysis.[40] In *Hentz*, for instance, the Pennsylvania Commonwealth Court concluded that the trial court properly refused to allow a plaintiff to file an untimely appeal *nunc pro tunc* where he alleged that his former attorney fraudulently told him that an appeal had been filed. In concluding that an untimely appeal should not be granted due to the attorney's fraudulent conduct, the *Hentz* Court observed that the "fraudulent conduct alleged in the present case, like negligent conduct, is actionable, and any injury which resulted to appellant may be remedied by appropriate legal recourse." *Hentz*, 481 A.2d at 1000. Likewise, in *Hughes*, the Commonwealth Court agreed with *Hentz* that extending appeals due to fraudulent statements by attorneys

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39. *See* Answer of Defendant John D. Murphy re: *Peck*, Memorandum at 16-17.

40. In their initial Petition, plaintiffs urged this Court to consider as guidance the standards applied in granting *nunc pro tunc* appeals. Plaintiffs' Petition, Memorandum at 17-18 (citing *In re Interest of C.K., supra*, 535 A.2d at 641). More specifically, they asked this Court to consider the "non-negligent happenstance principle" set forth in *Bass v. Comm. Bureau of Corrections*, 485 Pa. 256, 401 A.2d 1133 (1979) and *Cook v. Unemployment Compensation Bd. of Rev.*, 543 Pa. 381, 671 A.2d 1130 (1996). Various defendants argued that this standard was not analogous. Plaintiffs ultimately agreed, arguing that, in fact, the standard for opening a judgment was broader. *See, e.g.*, Plaintiffs Response to Defendant Nazareth Hospital re: *Cunningham*, Memorandum at 22-24.

to their clients should not be allowed because "extending appeal times on the basis of fraud or misconduct of a party's own attorney would tend to encourage such abuses, and could not, therefore, be logically supported." *Hughes, supra*, 619 A.2d at 392 (*quoting, Hentz v. Civil Service Commission*, 481 A.2d at 1000).

These two cases are distinguishable as to their facts and rationales. Both *Hentz* and *Hughes* involved discrete, single instances of attorney fraud. Their facts do not compare to the broad pattern of professional dereliction and fraud outlined in the instant petition. Moreover, the instant case focuses on attorney fraud that prevents trial, not appellate review of possible errors at the trial level. Finally, this Court does not believe that the rationale underlying the *nunc pro tunc* appeal standard is applicable here, as it is extremely unlikely that this Court's ruling would tend to encourage any attorney to engage in so global a pattern of misconduct affecting so many of his cases in order to salvage one case.

The similarities and differences between these standards are also explored in *In re the Interest of C.K., supra*. In that case, the Superior Court concluded that the trial court properly refused to allow an appeal *nunc pro tunc* where the attorney filed his appeal late because his mother had suffered a massive myocardial infarction and he was forced to be out of his office for three weeks. In that case, the Superior Court observed, the attorney had failed to arrange for substitute counsel to monitor his cases; consequently the case did not fall within the non-negligent happenstance rule for allowing late appeals *nunc pro tunc* that had been carved out in *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 1133 (1979).

In re Interest of C.K., supra, 535 A.2d at 635-36 & 38. Moreover, the attorney did not allege that his late filing was due to fraud or a breakdown in the court system. Rather, this was a case of attorney neglect and that ground would not suffice to open either a final judgment or the grant of an appeal *nunc pro tunc*. *In re Interest of C.K., supra*, 535 A.2d at 640.

In broader terms, the *In re Interest of C.K.* Court discussed the subtle distinction between the standards for opening a final judgment and granting an appeal *nunc pro tunc*. While the Superior Court expressed its view that there was an "unnecessary distinction" between the standards that apply to opening a final judgment and the granting of an appeal *nunc pro tunc*, it nonetheless stated that the standard for a trial court's opening a judgment is broader: to open a final judgment, "the standard is fraud or other 'extraordinary cause.' " To allow an appeal *nunc pro tunc*, the standard is " 'fraud or breakdown in court operations' and, of course, the *Bass* non-negligent happenstance ground." *Id.*, 535 A.2d at 641. After acknowledging that a then recent opinion of an en banc panel of the Court in *Luckenbaugh, supra*, may have blurred these distinctions, the Superior Court concluded:

> Nevertheless, the standards remain somewhat different in that *it would appear that some equitable considerations, like those present in the Estate of Gasbarini, may sway a court to grant relief from a final judgment and yet would not be enough to permit the allowance of an appeal nunc pro tunc*." 535 A.2d at 642 (emphasis added).

This evocation of *Gasbarini* suggests why the "extraordinary cause" standard is broader than the criteria for *nunc pro tunc* appeals. As the Superior Court observed in elaborating on *Gasbarini*, it "presented the court with a factual scenario sufficiently unique and compelling to warrant relief, although it did not fit precisely with the traditional principles applicable to such cases." *Id.*, 535 A.2d at 642 n.4.

This view, that judgments may be opened based on broader equitable standards, was also articulated two years later in *Vanleer v. Lerner*, 384 Pa. Super. 558, 559 A.2d 577, 579 (1989):

> In the case of fraud or other equitable demands, our Supreme Court has allowed trial courts to modify or rescind orders beyond the statutory time limit. *Estate of Gasbarini v. Medical Center of Beaver*, 487 Pa. 266, 409 A.2d 343 (1979). Such equitable demands include the disbarring of one's attorney (see *Gasbarini*) or mistakes made by the court or its officers. *Great American Credit Corporation v. Thomas Mini Markets*, 230 Pa. Super. 210, 326 A.2d 517 (1974). The present case does not contain such 'extraordinary cause' that would allow us to affirm the trial court's overreaching actions. *Vanleer, supra*, 559 A.2d at 579.

Under *Vanleer*, then, extraordinary cause is not just "mistakes made by the court or its officers," but also "equitable demands" which presumably could include

instances other than attorney disbarment. Clearly, as defendants argue, mere attorney neglect or oversight is not an extraordinary cause that would justify opening a judgment. *See e.g., Simpson v. Allstate Ins. Co., supra*, 504 A.2d at 337-38. The broad pattern of professional dereliction, diagnosed debilitating depression and fraud that plaintiffs outline in the present Petition, however, is not mere neglect or oversight. Rather, it appears to present this Court "with a factual scenario sufficiently unique and compelling to warrant relief"[41] that the Pennsylvania Supreme Court encountered in *Gasbarini*.

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41. *In re Interest of C.K., supra*, 535 A.2d at 642 n.4 (commenting on *Gasbarini*). The one case cited that bears the closest resemblance to the facts in the instant Petition is *Boughner v. Secretary of Health, Education and Welfare*, 572 F.2d 976 (3d Cir. 1978), in which the Third Circuit granted a motion to vacate an order granting summary judgment pursuant to Federal Rule 60(b)(6). In *Boughner*, the Court of Appeals for the Third Circuit considered consolidated appeals by six plaintiffs whose attorney, Peter Krehel, failed to oppose summary judgment motions that were granted against them. The plaintiffs initially asserted that the judgments should be opened for three reasons: their attorney had been intensely involved in a judicial campaign; he had lost the secretary who tended to his calendar; he had a large backlog of cases. The trial court concluded that these reasons were insufficient grounds for opening judgment. A survey, however, revealed that the attorney had failed to file a responsive pleading in 52 H.E.W. cases. "This egregious conduct," the Third Circuit observed, "amounted to nothing short of leaving his clients unrepresented." *Id.*, at 977. In deciding to open the judgments, the Court noted that "the conduct of Krehel indicates neglect so gross that it is inexcusable. The reasons advanced for his failure to file opposing documents in a timely fashion are unacceptable." *Id.* at 978. While this Court agrees with defendants that Federal Rule of Civil Procedure 60 is inapplicable in a state court proceeding, the Third Circuit's reaction to a pattern of extreme professional dereliction is instructive.

Defendants also seek to distinguish *Gasbarini*, however, by emphasizing that it involved a solo practitioner, whereas the instant case involves an attorney working within the structure of a firm.[42] The central issue, defendants contend, is not Mr. Smith's mental breakdown or professional dereliction and fraud, but rather the negligence of the principal of the Beasley firm in failing, *inter alia*, to supervise Mr. Smith adequately. This negligence, defendants conclude, would not constitute the requisite "extraordinary cause."[43]

While at first glance defendants arguments seem reasonable, their practical implications are perilous. In essence, defendants are requesting a shift in focus from whether the orders in these cases should be opened to whether there is a viable malpractice action against the Beasley firm and its principal. Moreover, defendants implicitly acknowledge that such negligence cannot be determined as a matter of law, since they seek additional discovery to document the alleged negligence of Mr. Beasley and his firm. For instance, certain defendants seek the following:

> A review of all of Mr. Smith's files to determine whether he was able to perform his responsibilities as an attorney on other matters.

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42. *See, e.g.* Answer of Defendant Dr. Murphy re: *Peck*, Memorandum at 7.

43. *See, e.g.*, Answer of Dr. Richman and BCRSG Anesthesia re: *Foody*, Memorandum at 9-10. Defendants also seek additional discovery to document this alleged negligence. *Id. See also* Answer of Defendant Nazareth Hospital re: Cunningham, Memorandum at 9; Answer of Defendant Thomas Jefferson University Hospital et al. re: *Mercer*, Memorandum at 30-32.

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Written and deposition discovery of Mr. Smith's former colleagues to ascertain whether Mr. Smith's pattern of conduct in the 14 cases in which Mr. Beasley seeks relief was consistent with the pattern of Mr. Smith's conduct in all of the other matters in which he has been involved.

Depositions of the three affiants — Messrs. Beasley and McLaughlin and Ms. Segal — upon which the Petitions are based to evaluate the credibility and demeanor of those witnesses and to determine the facts as they relate to Mr. Smith's handling of files.

Written and deposition discovery of the supervisory role that Mr. Beasley played in Mr. Smith's handling of files.

Written and deposition discovery of Mr. Smith's other files to ascertain whether he was performing his duties in those cases.

Depositions of the putative experts who Mr. Smith contacted and allegedly gave a "favorable review" of the cases to determine the veracity of such allegations. [Petition for Scheduling Order of Certain Defendants and Former Defendants, Memorandum at 5-6.]

This list, moreover, is "merely illustrative and by no means exhaustive of the types of discovery that are necessary." [*Id.*]

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Following the path defendants suggest would prematurely shift attention toward an action that has not yet been filed — or in any event — is not before this Court. It would require this Court to grapple with issues not properly before it, with the unusual posture of the defendants initiating the malpractice analysis as to the plaintiffs' attorneys. It injects, as well, the notion that in all future cases to open judgment, a trial court also would be obliged to examine all possible semblances of professional associations. This Court believes only defendants would benefit and that the injured plaintiff petitioners would bear the brunt of protracted war against not only the defendants but also associated professionals to the central attorney whose conduct resulted in the entry of the judgments. It is therefore essential to focus sharply on the relevant issue: whether there is extraordinary cause to open the judgments in this case. Based on the record presented by plaintiffs, the Court finds that such extraordinary cause does exist.

Another critical inquiry remains. A request to open a judgment (of non pros), the Superior Court has observed, goes to the "conscience of the court", which is required to "balance the equities and to deny the petition even where all the elements coalesce if the granting of relief would cause undue hardship or prejudice to the opponents." *Jung v. St. Paul's Parish*, *supra*, 560 A.2d at 1358.

The defendants have raised only vague claims of prejudice based either on general claims of delay or the changed insurance status of a codefendant. In the *Cunningham* case, for instance, defendant Nazareth Hospital states that plaintiffs have failed to show that it would not be

prejudiced. It then asserts only vague but "obvious prejudice" and that it owes no liability to the plaintiffs.[44] Defendant KRN contends that it would suffer prejudice because over a year has passed since judgment was entered, the expert they retained may no longer be available, memories have dimmed, and they will be obliged to report this case again to their insurance carrier which might jeopardize their insurance.[45] Defendant Edward Chairman in the *Foody* case states merely that he "should be free to regard this lawsuit as being at an end."[46]

In the *Gault* case, defendant Children's Hospital merely states that opening the judgment will cause "obvious prejudice" to it and defendant Froese who owe no liability to the Gaults. They also claim that they will be prejudiced because of the changed insurance status of co-defendants whose insurer PIC has been placed into receivership.[47] Defendant Norwood states generally that he would be "severely prejudiced" if this Court opened the judgment in his favor without indicating any actual prejudice.[48]

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44. Answer of Defendant Nazareth Hospital re: *Cunningham*, Memorandum at 17.

45. Answer of Defendants KRN Associates re: *Cunningham*, Memorandum at 29.

46. Answer of Dr. Chairman re: *Foody*, Memorandum at 16. Defendants Graduate Hospital, Graduate Health System and Dr. Strelecky do not raise the issue of prejudice.

47. Answer of Defendant CHOP and Norbert Froese, M.D. re: *Gault*, Memorandum at 16-19.

48. Answer of Defendant Norwood and Children's Surgical Associates re: *Gault*, Memorandum at 9-10.

Appendix A

Defendants Dr. Jobes and the Trustees of the University of Pennsylvania in the *Garner* case also claim a vague prejudice if they are forced to continue to defend a case in which they have no liability. They likewise claim the possibility of inadequate insurance coverage due to the insolvency of at least two major malpractice insurers.[49]

In the *Peck* case, defendant CHOP merely asserts that opening the judgment will cause "obvious prejudice" since CHOP owes no liability to the Pecks. It also claims prejudice due to the change in the insurance status of two co-defendants because PIC has been placed in receivership. Defendant Marshall Jacobs claims "extreme prejudice" without any specification other than "he was properly dismissed by final order of the trial court and is entitled to rely on the finality of the judgment."[50]

Finally, the defendants in the *Kerwin* case, Copley Pharmaceutical and Thrift Drug, claim generally that opening the judgments would cause undue prejudice to defendants who complied with discovery deadlines.[51] Defendants in the *Mercer* case merely assert an interest

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49. Answer of Dr. Jobes and Trustees of the U. of Pa. re: *Garner*, Memorandum at 30.

50. Answer of Defendant Marshall Jacobs re: *Peck*, Memorandum at 11. *See also* Answer of Defendant CHOP re: *Peck*, Memorandum at 16-18.

51. Answer of Defendants Copley Pharmaceutical and Thrift Drug re: *Kerwin*, memorandum at 5.

in seeing an end to the litigation against them and claim prejudice due to delay.[52]

Vague claims of prejudice based on the passage of time no longer suffice to establish prejudice. The Pennsylvania Supreme Court recently abandoned the concept of "presumed prejudice" in non pros cases based on the mere passage of time. Instead, the defendant "is free" to show "actual prejudice." *Jacoby v. Halloran*, 1998 Pa. LEXIS 583, *12 (Pa. Apr. 2, 1998). Actual prejudice, the *Jacobs* Court observed, might be established by "the death or absence of a material witness" or "any substantial diminution of a party's ability to properly present its case at trial." *Id.*, 1998 Pa. LEXIS 583, *14 (quoting *Metz Contracting Inc. v. Riverwood Builders, Inc.*, 360 Pa. Super. 445, 520 A.2d 891, 894 (1987)). *See also*, *Biondillo v. Dept. of Trans.*, 674 A.2d 1175, 1178 (Pa. Cmwlth. 1996) (defining prejudice as "any substantial diminution in a party's ability to properly present a case"). Under these standards, defendants' claimed prejudice due to the changed insurance status of a co-defendant likewise would not constitute "actual" prejudice. When balancing the equities, therefore, defendants' vague claims of prejudice and complaints related to insurance covering any possible legal liability to injured plaintiffs are outweighed by the plaintiffs' loss of their legal claims due to "extraordinary cause". The interests of justice and judicial economy would be served best by returning these cases to the dockets for a trial (or pre-trial) ruling on the merits.

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52. Answer of Defendants Thomas Jefferson University Hospital, Jewell Osterholm, M.D., Jerome Cotler, M.D., and Christie McMorrow, M.D. re: *Mercer*, Memorandum at 35.

Appendix A

3. *The "Proper-Cause-Shown" Standard: Johnson v. Cristol, M.D., September 1994, No. 928 and Durante v. O'Shea, January 1996, No. 234*

a. *Introduction*

The cases of *Durante v. O'Shea, M.D.*, January 1996, No. 234 and *Johnson v. Cristol*, September 1994, No. 928 (hereinafter "*Durante*" and\or "*Johnson*") differ from the cases just discussed in which dispositive summary judgment orders were issued as to all defendants, thereby ending the action against them. Instead, in *Johnson*, a *sua sponte* judgment of non pros was entered on January 15, 1998, based on docket inactivity. In *Durante*, an uncontested summary judgment motion was granted in favor of only one of two defendants (i.e. Chestnut Hill Hospital) by order docketed November 18, 1997.

b. *Factual Background*

Both *Durante* and *Johnson* are medical malpractice actions. The plaintiff in *Durante* alleges that she incurred injuries to her transverse mesocolon, the mesentery of her small intestine and her iliac vein during a laproscopic procedure to remove an ovarian cyst.[53] She asserted claims against both Dr. O'Shea, who performed the surgery, and Chestnut Hill Hospital, where the surgery was performed. The *Johnson* action, a wrongful death and survival action, was brought by Margaretta Johnson on behalf of decedent

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53. Complaint, *Durante v. O'Shea*, January 1996, No. 234, ¶¶6 & 9.

Francis Oberholtzer who experienced a fatal myocardial infarction allegedly caused by the administration of eye drops by defendant Dr. Cristol.[54]

c. *Applicable Standards*

1. *Non Pros Judgment*

In the *Johnson* case, defendant Dr. Cristol concedes that a judgment of non pros, like a default judgment, may be opened for proper cause shown.[55] This standard is less stringent than that for opening a final judgment in a contested proceeding. *Jung v. St. Paul's Parish*, *supra*, 560 A.2d at 1358; *In re Interest of C.K.*, *supra*, 535 A.2d at 641 n.3; *Esslinger v. Sun Refining & Marketing Co.*, 379 Pa. Super. 69, 549 A.2d 600, 602-03 (1988).

A request to open a judgment of non pros invokes the equitable powers of a court. *Jung v. St. Paul's Parish*, *supra*. A non pros judgment may be opened if the following criteria are met:

1) The petition to open must be promptly filed;

2) The default or delay must be reasonably explained; and

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54. Answer of Defendant Cristol re: *Johnson*, Memorandum at 2. Plaintiffs' Petition, Memorandum at 12.

55. Answer of Defendant Cristol re: *Johnson*, Memorandum at 6.

3) Facts must be shown to exist which support a cause of action. *Jung v. St. Paul's Parish*, *supra*, 560 A.2d at 1358.

In the *Johnson* case, the first criteria that a petition to open should be promptly filed has been met since plaintiff filed her petition on February 6, 1998 approximately 3 weeks after the judgment was entered. The third criteria also has been satisfied since plaintiff filed a complaint to which no preliminary objections have been filed. Moreover she has reiterated her claim against Dr. Cristol in the Omnibus Petition. *See generally*, *Esslinger v. Sun Refining*, *supra*, 549 A.2d at 603 (plaintiff "has filed a complaint which established that she has sufficient facts to support the underlying cause of action").

Finally, as described below (B.3.d) in the discussion of the proper cause standard, plaintiff also has satisfied the second criteria for opening a judgement of non pros since she has offered a reasonable explanation for the delay in this case.[56]

2. *Interlocutory Summary Judgment*

An interlocutory order that does not end the action remains within the control of the trial court because it is not bound by the statute, 42 Pa.C.S.A. § 5505, that limits the time for reconsideration to 30 days. *Key Automotive*

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56. Since the arguments of Dr. Cristol (regarding the *Johnson* case) and Defendant Chestnut Hill Hospital (regarding the *Durante* case) are nearly identical on the proper cause issue, they will be addressed together in the interest of clarity and economy.

Equipment Specialists, Inc. v. Abernethy, 431 Pa. Super. 358, 636 A.2d 1126, 1128 (1994); *Marble v. Hill*, 425 Pa. Super. 149, 624 A.2d 190, 192 (1993). Defendant Chestnut Hill Hospital in the *Durante* case properly concedes[57] that the Order granting summary judgment as to it alone is interlocutory because it did not end the action as to the remaining defendant, Dr. O'Shea.[58]

The standard for opening an interlocutory order is not as strict as the requirement for showing fraud or extraordinary cause to open a final, adversarial order. Rather, an interlocutory order, like a default judgment, may be modified at any time upon proper cause shown. *In re Interest of C.K.*, *supra*, 535 A.2d at 641 n. 3. Defendant Chestnut Hill Hospital concedes that the "proper-cause-shown" standard applies to *Durante*.[59]

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57. Answer of Defendant Chestnut Hill Hospital re: *Durante*, Memorandum at 5-6.

58. Prior to March 1994, entry of summary judgment as to only one of multiple parties was a final, appealable order even where the order did not terminate the entire action. *Sweener v. First Baptist Church of Emporium*, 516 Pa. 534, 533 A.2d 998, 1000 (1987) . In 1992, however, the Rules of Appellate Procedure were amended effective March 11, 1994. Under amended Pa.R.A.P. 341(c) , an order granting summary judgment that disposes of less than all claims or parties is interlocutory. *Bonner v. Fayne*, 441 Pa. Super. 432, 657 A.2d 1001, 1002 (1995).

59. Answer of Defendant Chestnut Hill Hospital: re *Durante*, Memorandum at 5 ("The proper-cause-shown standard admittedly applies to this case").

Appendix A

d. *Application of the Proper Cause Standard to the Durante and Johnson Cases*

Both defendants Chestnut Hill Hospital ("hospital") and Dr. Cristol argue that plaintiffs have failed to establish the requisite "proper cause" for opening the respective judgments in *Durante* and *Cristol* because under this standard only "excusable" neglect by an attorney can be a basis for opening a judgment: "inexcusable" attorney neglect, such as the neglect of Mr. Smith — or Mr. Beasley — in the instant cases cannot be the basis for opening a judgment.[60] Plaintiffs respond that the defendants have misinterpreted the applicable standard for determining proper cause. The actual distinction drawn by courts when considering whether to open a judgment is "between 'oversight or neglect,' on one hand, and *deliberate* decisions made by attorneys to impede their opponent's case or for other strategic purposes."[61]

The cases cited by the parties support plaintiffs' view that attorney neglect is grounds for opening a judgment. In *Dept. of Trans. v. Nemeth*, 497 Pa. 580, 442 A.2d 689 (1982) — a case also cited by defendants but which supports

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60. Answer of defendant Chestnut Hill Hospital re: *Durante*, Memorandum at 6-8. *See also* Answer of Defendant Dr. Cristol re: *Johnson*, Memorandum at 6-8. In both of their Answers, which are nearly identical on this issue, defendants raise the issue of Mr. Beasley's independent responsibilities to his clients and his supervisory responsibilities over Mr. Smith. *See* n. 55 *infra*.

61. Plaintiffs' Reply to the Answer of Defendant Chestnut Hill Hospital re: *Durante*, Memorandum at 20; Plaintiffs' Reply to Answer of Dr. Cristol re: *Johnson*, Memorandum at 20-22.

plaintiffs' analysis — the Pennsylvania Supreme Court clearly distinguishes between attorney oversight and a deliberate decision not to defend. Thus in *Nemeth*, the Court concluded that a default judgment should be opened where the attorney, Mr. Sharkey, testified that because his eight member firm was dissolving, he assigned the case to another attorney in his present firm but failed to monitor whether an answer was actually filed. Under these circumstances, the Supreme Court concluded the judgment should be opened on the basis of attorney neglect based on the following rationale:

> 'Errors of counsel . . . which indicate an oversight rather than a deliberate decision not to defend have been held to constitute sufficient legal justification to open a default judgment.' *Johnson v. Yellow Cab Co.*, 226 Pa. Super. 270, 307 A.2d 423 (1973) (new counsel incorrectly assumed that responsive pleading had been filed); *Stephens v. Bartholomew*, 422 Pa. 311, 220 A.2d 617 (counsel failed to read complaint in time to file answer due to other business commitments); *Balk v. Ford Motor Co.*, 446 Pa. 311, 285 A.2d 128 (insurance carrier lost moving party's court papers); *Fox v. Mellon*, 438 364, 264 A.2d 623 (1970) (insurance claims manager erroneously assumed that there was time remaining in which to respond to complaint). *Nemeth, supra*, 442 A.2d at 691.

The *Nemeth* case undercuts the argument by defendant hospital and Dr. Cristol that there is no proper cause to open the judgment in this case because Mr. Beasley, as supervisor

of Mr. Smith and owner of the firm, failed in his supervisory responsibilities.[62] Clearly, Mr. Sharkey, the principal attorney in *Nemeth* neglected his supervisory responsibilities over his client's case. Moreover, *Nemeth*, like the instant case, does not involve a single practitioner, but deals with the issue of attorney neglect within a firm context. Nonetheless, the attorney\firm neglect in *Nemeth* was grounds for opening the judgment. The analysis of the *Nemeth* Court is instructive: rather than assessing which attorney within the firm was ultimately neglectful, the *Nemeth* Court focused on the nature of the neglect — a failure to monitor or supervise a case — to conclude that it was grounds for opening the default judgment.

Moreover, plaintiffs have cited numerous other cases where mere attorney neglect — as opposed to a deliberate decision not to defend — is a valid reason to open a judgment. *See, e.g., Toplovich v. Spitman*, 239 Pa. Super. 327, 361 A.2d 425, 426 (1976) (judgment opened where attorney neglect consisted merely "of his careless failure to sign the answer and forward it timely by mail" to the prothonotary); *Versak v. Washington*, 359 Pa. Super. 454, 519 A.2d 438 (1986) (default judgment opened where attorney neglect consisted of counsel's failure to pursue the proper procedure to obtain review of judgment); *Bildstein v. McGlinn*, 320 Pa. Super. 416, 467 A.2d 601, 605 (1983) ("Errors of counsel which indicate an oversight or mistake rather than a deliberate decision not to defend have been found to constitute sufficient explanation to warrant the opening of a default judgment").

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62. Answer of Defendant Chestnut Hill Hosp. re: *Durante*, Memorandum at 7. Answer of Defendant Dr. Cristol re: *Johnson*, Memorandum at 7.

Appendix A

Defendants hospital and Cristol rely on *Lewis v. Reid*, *supra*, a Superior Court case that predates *Nemeth*, to support their position that a judgment should not be opened where the attorney neglect is inexcusable.[63] A critical factor in the *Lewis* decision, however, was that the petitioner had waited over four years before filing a petition to open the non pros that had been entered for failure to answer supplemental interrogatories.[64] The first prong of the non pros opening analysis, therefore, was not met. In the instant case, plaintiffs filed their omnibus Petition to open judgments on February 6, 1998, which was within 3 weeks from the date when non pros was entered in *Johnson*. It was filed 2 1\2 months from the date that summary judgment was entered in *Durante* as to defendant hospital and only days from the date that Mr. Beasley's affidavit states that he and Mr. Smith's colleagues first learned of Mr. Smith's fraudulent concealment of the summary judgment orders in the cases set forth in the Petition.

There is also evidence of attorney neglect in both the *Johnson* and *Durante* cases. The attorney neglect in *Johnson* is documented by the *sua sponte* court Order granting non pros for docket inactivity. Plaintiff also notes that approximately 8 months prior to this entry of non pros, her attorney Mr. Smith had sent her a fraudulent letter (dated April 30, 1997) in which he enclosed the case management

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63. *See, e.g.*, Answer of Defendant Dr. Cristol re: *Johnson*, Memorandum at 7-12. The various arguments presented by these defendants derive from *Lewis*.

64. *Lewis*, *supra*, 366 A.2d at 925. *Lewis* was previously discussed in section (B.2).

order and then assured her "that we expect to be able to meet all deadlines."[65] This letter, when considered in the context of the docket entries and defendant's implicit acknowledgment that Mr. Smith produced no written discovery or expert report in this case,[66] certainly evidences attorney neglect.

The attorney neglect in the *Durante* case, plaintiffs allege, consists of Mr. Smith's failure to respond to the hospital's summary judgment motion based on his failure to produce an expert report as well as his failure or neglect to obtain any discovery from either defendant.[67] In her

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65. Plaintiffs' Petition, Ex. "T;" Plaintiffs' Reply to Dr. Cristol's Answer re: *Johnson*, Memorandum at 16.

66. Plaintiff's Reply to Dr. Cristol's Answer re: *Johnson*, Memorandum at 8; Defendant Cristol's Memorandum at 2.

67. Plaintiffs' Reply re *Durante*, Memorandum at 8. In fact, the hospital's uncontested summary judgment was based on failure to produce an expert report in violation of the case management order. *See* Defendant Chestnut Hill Hospital's Motion for Summary Judgment, ¶¶ 4 & 5. In responding to plaintiff's claim that Mr. Smith failed to take discovery from the defendants, defendant hospital merely notes that the docket indicates that he filed a complaint, responses to defendants' new matter and a petition for extraordinary relief, thereby implicitly conceding plaintiffs's assertion. Answer of Defendant Chestnut Hill Hospital re: *Durante*, Memorandum at 2. Yet, a few days before summary judgment was granted as to defendant hospital, Mr. Smith filed a Petition for Extraordinary Relief seeking to depose Dr. O'Shea, claiming prejudice. In response to this petition, Dr. O'Shea stated that during a settlement conference

(Cont'd)

complaint, Karen Durante asserted a claim against both her doctor and Chestnut Hill Hospital for injuries to her transverse mesocolon, small bowel mesentery and left iliac vein during a laparoscopy. In the Omnibus Petition, plaintiff continues to assert a claim against the hospital on the basis of evidence in the proffered expert report that Dr. O'Shea "encountered difficulty in maintaining insufflation of the plaintiff's abdomen during the laparoscopy procedure." This inadequate insufflation, plaintiff argues, "clearly may have been due to the Hospital's failure to properly maintain its equipment and/or negligent failure of the Hospital's operating staff to determine whether the instruments were working properly."[68] In light of this claim as to the hospital, Mr. Smith's failure to respond to the hospital's summary judgment motion is analogous to the neglect in *Nemeth*, *supra*, except that it was part of a broader pattern of fraud and abandonment of numerous clients' cases.

(Cont'd)
on November 3, 1997, "plaintiffs' counsel represented to settlement master Gordon Gerber that he did not need Dr. O'Shea's deposition in order to retain our expert. Clearly there has been no prejudice." *See* Plaintiffs' Reply to Chestnut Hill Hospital re: *Durante*, Ex. "A" & "B." After the court granted an extension of the discovery deadlines, Mr. Smith produced an expert report. Plaintiffs maintain, however, that he never deposed Dr. O'Shea despite the representation in his Petition for Extraordinary Relief that "plaintiff has been prejudiced as a result" of the failure to depose this doctor. *Id.*, Plaintiffs' Reply to Chestnut Hill Hospital, Ex. "A." This, then, is another instance of his neglect. *See* Plaintiffs' Reply re: *Durante*, Memorandum at 2, n.1.

68. Plaintiffs' Reply to Defendant Chestnut Hill Hospital re: *Durante*, Memorandum at 3.

Defendants also argue that the judgments should not be opened because Mr. Smith's illness was not incapacitating.[69] But the Supreme Court in *Thorn v. Clearfield*, *supra*, did not require the complete incapacitation of an attorney as one of the criteria for opening a judgment of non pros. The attorney in *Thorn* suffered a "heart relapse" but still performed some professional duties. As the Pennsylvania Supreme Court in *Thorn* observed:

> The testimony clearly establishes that although appellant's attorney did in fact perform *some* professional duties during the period from the time he was ruled to file the complaint and the time judgment of non pros was entered, he was not physically capable of performing *all* his tasks, and it would appear that his work suffered during this period. *Thorn*, *supra*, 218 A.2d at 299 (emphasis added).

The diminished health and ability of the plaintiff's attorney, the Court concluded, were equitable considerations sufficient for the opening of a non pros judgment. Thus, the mere fact that Dr. Rieger's report does not indicate that Mr. Smith was completely incapacitated is not conclusive.

On a final note, defendants Cristol and Chestnut Hill Hospital argue that plaintiffs in *Johnson* and *Durante* have not established that the defendants will not be prejudiced by opening the judgment. Neither defendant, however, has set

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69. Defendant Chestnut Hill Hospital's Answer re: *Durante*, Memorandum at 8. Answer of Defendant Dr. Cristol re: *Johnson*, Memorandum at 8-9.

forth any "actual prejudice". Defendant Dr. Cristol, for instance, merely alleges that the non pros judgment was proper in *Johnson* and that he will be prejudiced if it is opened. Dr. Cristol does not identify any more specific or actual prejudice.[70] Defendant hospital asserts two kinds of prejudice. First, it, like Dr. Cristol, asserts that opening a judgment after 3 months will cause "obvious" prejudice to the hospital which "owes no liability to Ms. Durante in the first instance."[71] As noted earlier, however, the Pennsylvania Supreme Court has abandoned the concept of presumed prejudice in non pros cases based on the mere passage of time. Instead, the defendant "is free" to show "actual prejudice," which the vague allegations by Chestnut Hill Hospital and Dr. Cristol do not establish. *Jacobs v. Halloran*, 710 A.2d 1104, 1998 Pa. LEXIS 583, *8, *12 (Pa. Apr. 2, 1998).

In addition, the hospital claims that it will be prejudiced by the changed insurance status of its co-defendant, Dr. O'Shea. The hospital argues that after its co-defendant's insurer, PIC insurance group was placed into receivership, the Pennsylvania Property and Casualty Insurance Guarantee Association (PIGA) will "stand in its shoes." Because there are certain limitations of PIGA's liability, the hospital might be exposed to greater liability.[72] Defendant presents no

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70. Answer of Defendant Cristol re: *Johnson*, Memorandum at 14.

71. Answer of Defendant Chestnut Hill Hospital re: *Durante*, Memorandum at 14.

72. Answer of Defendant Chestnut Hill Hospital re: *Durante*, Memorandum 14-15.

precedent to support its claim of prejudice due to this change in insurance status. The Supreme Court, however, has staked out a different definition of prejudice: "the death or absence of a material witness" or "any substantial diminution of a party's ability to properly present its case at trial." *Jacobs v. Halloran*, 1998 Pa. LEXIS 583, *14 (Apr. 2, 1998). *See also, Biondillo v. Dept. of Trans.*, 674 A.2d 1175, 1178 (Pa. Cmwlth. 1996) (prejudice for purposes of non pros is "any substantial diminution in a party's ability to properly present a case").

Upon analysis of these considerations, the precedent cited, and the record presented, the plaintiffs in the *Durante* and *Johnson* cases have presented sufficient evidence of attorney neglect to allow the opening of judgments in these cases.

4. *The Unique Case of Martino v. Panichelli*

In their Petition,[73] plaintiffs argue that the "proper cause" standard clearly applies to the case of *Martino v. Panichelli*

73. Defendants Panichelli et al. responded to plaintiffs' Petition with both an Answer and a Motion to Dismiss. In their motion to dismiss, defendants argue (1) that the petition should be dismissed under Rule 1032(a) for failure to state a cause of action since Pa.R.C.P. 1007 provides only 2 ways to commence a cause of action (complaint or summons) and (2) that the petition is an impermissible attack on a final order since 42 Pa.C.S.A. §5505 limits reconsideration of a final order to 30 days. Various other defendants have raised the first procedural objection and, in the interest of judicial economy they are discussed together in section (C.2) *supra*. The second argument, raising the limits set forth in 42 Pa.C.S.A. §5505, has necessarily been addressed in the substantive analysis of this opinion, section (B.2) *infra*.

because it "was dismissed by order of discontinuance, based on Mr. Smith's failure to file a complaint."[74] Unfortunately, the procedural context of this case is more complicated than plaintiffs suggest.

Martino v. Panichelli is a legal malpractice action against Michael Panichelli and the law firm of Litvin, Blumberg, Matusow & Young on behalf of plaintiff John Martino whose malpractice action against several doctors was dismissed on summary judgment for failure to present an expert witness.[75] After Mr. Martino's medical malpractice action was dismissed, he initiated the action against Panichelli when his attorney, Thomas Smith, filed a Writ of Summons on September 12, 1996. Both parties concede that a Rule to File a Complaint within 20 days was filed *sua sponte* by court Order dated April 17, 1997. Counsel were further ordered to appear before the Day Forward team leader on May 19th. The Order then provided:

> If a complaint is filed within 20 days from the date of this Order said appearance is for the purpose of conducting a Case Management Conference, otherwise said appearance is for the entry of an appropriate Judicial order for failure to prosecute.[76]

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74. Plaintiffs' Petition, Memorandum at 11.

75. Answer of Defendant Panichelli re: *Martino*, Memorandum at 1-2.

76. Answer of Defendant Panichelli re: *Martino v. Panichelli*, Ex. "C." *See also* Ex. "E," Affidavit of Charles Young, Esquire, ¶ 12.

Defendants state that after this Order by Judge Sheppard was entered, they reached an oral agreement with Mr. Smith that he would provide defendants "with a copy of an expert's report by June 20, 1997 or the *above mentioned matter will be dismissed with prejudice.*" Defendants affix a copy of May 19, 1997 letter to Mr. Smith that sets forth this oral agreement. *See* Defendants' Answer, Ex. "D". The Rule Returnable date for the April 17th Order was rescheduled for June 23, 1997. At that point, both parties agree, the Order had not been complied with, and the Court ordered the action discontinued. Both parties also agree that Judge Sheppard, while discontinuing the case, did not do so with prejudice. Instead, he asked defense counsel to notify Mr. Smith that he had ten days in which to get the Order of dismissal withdrawn.[77]

On July 23, 1997 the Court issued the following order:

> And Now, this 23rd day of July, 1997, it is hereby ORDERED and DECREED that the case of *Martino v. Panichelli*, September Term 1996, No. 502 is hereby *dismissed with prejudice.* Defendants' Answer, Ex. "A" (emphasis added).

Despite the clear language of the July 23, 1997 Order *dismissing* the entire *Martino* case with prejudice, plaintiffs baldly assert:

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77. Plaintiffs' Reply, Memorandum at 2-3 (referencing docket entries). Defendants' Answer, Ex. "E," Affidavit of Charles Young, ¶¶ 16-17.

> In sum, there is no colorable question as to the nature of the judgment in *Martino*. The case was dismissed "for failure to prosecute. *Id.* [Defendants' Memorandum], Exhibit "C." It was a judgment of non pros.[78]

In making this assertion, plaintiffs' cite Defendants' Exhibit "C," the April 17th Order, stating that if counsel failed to file a complaint an "appropriate Judicial order for failure to prosecute would be ordered." In so doing, however, they fail to grapple with the very precise words of the July 23, 1997 Order, which provided that "the case of *Martino v. Panichelli et al.*, September Term 1996, No. 502 is hereby dismissed with prejudice."[79]

As an initial step, it is necessary for this Court to determine the legal implications of Judge Sheppard's July Order so that the appropriate standard of review can be applied. This is a delicate inquiry since, under the rule of coordinate jurisdiction, a judge may not overrule the same order of a coequal judge absent new facts or precedent. *Goldey v. Trustees of the Univ. of Pa.*, 544 Pa. 150, 675 A.2d 264, 267 (1996). Clearly, plaintiffs have presented new facts in their Omnibus Petition seeking to open this judgment on the basis of Mr. Smith's professional dereliction. It is permissible for this Court to consider these new facts as they relate to opening the relevant July 23 Order in this case. It would not be permissible, however, for this Court to subvert

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78. Plaintiffs' Reply re: *Martino*, Memorandum at 3.

79. Defendants' Answer re: *Martino*, Ex. "A".

the intent or legal import of that Order by mischaracterizing a final order of dismissal as a non pros, and thereby applying an incorrect standard of review.

It is, of course, quite common for courts to issue judgments of non pros for failure to file a complaint, but in those cases the relevant orders were cast in terms of non pros. *See, e.g. Broglie v. Union Township*, 319 Pa. Super. 141, 465 A.2d 1269 (1983) (court ordered judgment of non pros for failure to file amended complaint) . Non pros may also be obtained by filing a praecipe after the issuance of a Rule to File a Complaint but, once again, that order is cast in terms of non pros. *See, e.g., Esslinger v. Sun Refining and Marketing*, 379 Pa. 69, 549 A.2d 600, 602 (1988).

Non pros may be ordered not only for failure to file a complaint, but also for failure to comply with court orders compelling response to discovery requests. *See, e.g., Lawrence v. General Medicine Assoc.*, 412 Pa. Super. 163, 602 A.2d 1360, 1361 (1992) (court ordered judgment of non pros for failure to respond to discovery requests). Indeed, when confronted with these early pretrial issues, courts have the discretion to dismiss a case for failure to respond to discovery requests. *See, e.g., Luckenbaugh v. Shearer*, 362 Pa. Super. 9, 523 A.2d 399 (1987), *app. denied*, 518 Pa. 626, 541 A.2d 1138 (1988) (plaintiffs' case dismissed with prejudice for failure to answer interrogatories); *Simpson v. Allstate Ins.*, 350 Pa. Super. 239, 504 A.2d 335 (1986) (trial court ordered Prothonotary to enter judgment for failure to comply with discovery order). When cases are dismissed with prejudice in such an adversarial setting, there must be a showing of prejudice or extraordinary cause before they can

be opened. *See*, *Simpson*, *supra*, 504 A.2d at 337-38; *Luckenbaugh*, *supra*, 523 A.2d at 401.

Finally, Pa.R.C.P. 1037(c), dealing with Judgments by Default, suggests the discretion and options available to a judge in cases of "default" or non pros, since it provides not only for procedures involving the entry of a judgment of non pros by filing a praecipe with the prothonotary but also provides:

> In all cases, the court, on motion of a party may enter *an appropriate Judgment* against a party upon default or admission. Pa.R.C.P. 1037(c) (emphasis added).

What is significant about these cases and Rule 1037(c) is the degree of discretion provided to a court. It is thus imperative to consider carefully the precise wording of an order to determine its implications. In this regard, the July 23 Order is unmistakably clear: it dismissed the *Martino* case with prejudice. It thus cannot be opened merely for proper cause shown; rather, plaintiffs must establish the requisite fraud or "extraordinary cause."

There is, however, the same evidence of Mr. Smith's abandonment of the *Martino* case that plaintiffs have pointed to regarding other cases throughout their petition — in the defendants' own documents. Defendants cite, for instance, a May 19th letter from defense counsel Charles Young to Mr. Smith confirming an oral agreement that he would provide an expert report by June 20, 1997 or the *Martino* case would be subjected to the extreme sanction of dismissal

with prejudice. Defendants' Answer, Ex. "D." In his affidavit, Charles Young stated that he had informed Mr. Smith that Judge Sheppard had given him 10 days in which to seek withdrawal of the June 23 dismissal order in this case but:

> Mr. Smith never requested that the dismissal be withdrawn and on July 23, 1997, I wrote Judge Sheppard a letter [Exhibit "C"] requesting that the court sign an order of dismissal. Defendants' Answer, Ex. "E," Affidavit of Charles Young, ¶ 17.

This failure of Mr. Smith to respond to the Court's invitation to seek removal of the adverse judgment is certainly consistent with the pattern of professional dereliction that is the basis for opening the eight final, adversarial judgments previously discussed.

5. *Request for Extension of Discovery Deadlines in Folger v. Dugan and Harris v. Chestnut Hill Hospital*

In their Omnibus Petition, plaintiffs request new scheduling orders for discovery in three cases that have not been dismissed but in which, they allege, Mr. Smith failed to conduct necessary discovery: *Folger v. Dugan*, July Term, 1996, No. 1010; *Harris v. Chestnut Hill Hosp.*, October 1995, No. 3221 and *Joyner v. Patterson*, May 1994, No. 964. [The *Joyner* case has been withdrawn from the Petition by letter dated June 11, 1998.] Plaintiffs have detailed the reasons

why a new scheduling order in both *Folger* and *Harris* should issue, while various defendants have opposed any extension.

In *Folger*, a medical malpractice case brought on behalf of a brain damaged infant, plaintiffs seek a new scheduling order because, they assert, Mr. Smith did not depose any of the five defendant doctors. Moreover, he failed to obtain an expert report. *See* Plaintiffs' Petition, ¶ 8b. The various defendants who responded do not deny that Mr. Smith did not conduct the discovery that plaintiffs' claim is essential for presenting a viable claim. Instead they emphasize plaintiffs' procedural irregularities and the prematurity of this petition because all discovery did not have to be completed until February 2, 1998. Defendants do not point to any specific prejudice they would suffer if the deadlines were extended. Defendant Frankford Hospital, for instance, vaguely states that "Defendants will be prejudiced if this case is further delayed." Defendant Dr. Moughan maintains that "further delay caused by another extension of the Case Management deadlines in this case will prejudice respondent." Finally, defendants Dr. Erica Turner and St. Christopher's Hospital state that they "will be prejudiced by the grant of extraordinary relief" without specifying the nature of this prejudice other than the "passage of time."[80]

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80. *See* Answers of defendant Beth Moughan re: *Folger*, Memorandum at 2-3; Defendant Frankford Hospital, Memorandum at 4. Frankford Hospital admits that no discovery depositions were taken. *Id.* at 1. *See generally*, Answer of Defendant Dr. Theresa Dugan; Answer of Dr. Erica Turner and St. Christopher's Hospital, Memorandum at 12.

Appendix A

In the *Harris* case, a medical malpractice action involving an alleged delay in diagnosing cancer, plaintiffs assert that they require a new discovery schedule because Mr. Smith conducted no depositions in this case. Although he did obtain an expert report, he failed to provide the expert with evidence critical to a failure to diagnose case — pathology slides. Plaintiffs further claim that the most critical missing piece in their discovery — the pathology slides — could be completed almost immediately.[81] Defendants Chestnut Hill Hospital and Dr. Ru-Lin Ko Tung, M.D., et al. do not dispute plaintiffs' description of the state of discovery in this case but they point out that Mr. Smith served a request for admissions on Dr. Tung, Chestnut Hill Hospital and Chestnut Hill Pathology. Moreover, defendants claim that they will have difficulty defending this case because of the passage of time. Answer of Defendants Chestnut Hill Hosp., et al re: *Harris*, Memorandum at 2-3, 12.

The Pennsylvania Supreme Court in *Feingold v. SEPTA*, 512 Pa. 567, 517 A.2d 1270, 1272 (1986), cautioned that its "approach to the enforcement of procedural rules, whether local or state-wide, is dictated by the facts and circumstances of each individual case." In setting forth a four-part test for determining when testimony of an expert witness could be excluded, it called for the analysis of prejudice to the various parties, the ability to cure this prejudice, whether the progress of a trial would be disrupted, and the willfulness or bad faith of a party. *Id.*, 517 A.2d at 1273. Other courts, when

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81. Plaintiffs' Petition, ¶8(c); Plaintiffs' Reply to defendants Chestnut Hill Hospital and Ru-Lin Ko Tung, M.D. re: *Harris*, Memorandum at 6.

grappling with discovery issues, have applied the *Feingold* approach, focusing on the facts of each case and the potential prejudice to all parties. *See, e.g., Curran v. Stradley, Ronon, Stevens & Young*, 361 Pa. Super. 17, 521 A.2d 451 (1987).

Applying these principles, the serious prejudice that the plaintiffs in *Folger* and *Harris* will encounter because of their counsel's failure to conduct adequate discovery far outweighs the vague claims of prejudice by the defendants if the discovery deadlines are extended. *See, e.g., Curran, supra*, 521 A.2d at 458 (Trial court erred in precluding expert witness identified 9 days prior to trial because "[i]n balancing the *Feingold* factors as they relate to each party, we conclude that the prejudice to Stradley substantially outweighs the potential prejudice to Panaccion"). In their Petition and replies, the plaintiffs in *Folger* and *Harris* have pointed to specific discovery necessary to their case. They have offered a compelling explanation for why this discovery was not completed — Mr. Smith's pattern of progressive abandonment of his cases during a discrete period. They have posed their request long before any trial; indeed, plaintiffs indicate that the *Folger* case has yet to be listed for trial. They also specifically identify how an inability to conduct this discovery would have a devastating impact on their case. In contrast, defendants have alleged only vague claims of prejudice.

These facts contrast markedly to those of *Stewart v. Rossi*, 452 Pa. Super. 120, 681 A.2d 214 (1996), *app. denied*, 547 Pa. 731, 689 A.2d 235 (1997), which is cited by defendants Dr. Turner and St. Christopher's Hospital in the *Folger* case and defendants Chestnut Hill Hospital and Dr.

Ru-Lin Ko Tung in the *Harris* case. In *Stewart*, the Superior Court affirmed the trial court's grant of summary judgment based on plaintiffs' failure to conduct discovery. A subsidiary issue involved whether the trial court had properly denied plaintiffs' last minute petition for extraordinary relief. In concluding that it was proper to deny this petition, the *Stewart* Court noted that plaintiffs had waited until "just prior to trial" to file it after conducting no discovery. Moreover, the Court more generally emphasized that because of plaintiffs' bad faith (i.e., failure to answer interrogatories carefully or to identify witnesses), the defendant was prejudiced in his ability to prepare a defense.

In the instant Petition, in contrast, plaintiffs seek additional discovery well in advance of trial. Defendants ability to prepare a defense should not, therefore, be prejudiced. The prior scheduling orders for these cases are therefore vacated and a new case management conference shall be scheduled promptly.

C. *PROCEDURAL ISSUES RAISED IN DEFENDANTS' PRELIMINARY OBJECTIONS AND MOTION TO DISMISS*

Preliminary Considerations: Rule of Coordinate Jurisdiction

As a preliminary issue, the rule of coordinate jurisdiction should be addressed. It is well established that judges of coequal jurisdiction should not overrule each other on the same motion in the same case. *Klein v. Weisberg*, 694 A.2d 644, 646 1997 Pa. Super. LEXIS 993 (Pa. Super. 1997), *app.*

denied, 1998 Pa. LEXIS 1134 (Pa. June 1998). There are, however, exceptions to this rule where a judge is presented with new facts or new precedent "that clearly warrant a new look at the question." *Riccio v. American Rep. Ins. Co.*, 705 A.2d 422, 425 1997 Pa. LEXIS 2735 (Pa. 1997). In addition, a co-equal judge may also make a different ruling on motions that are procedurally distinct such as summary judgment motions and preliminary objections. *Domenick v. Mercy Hosp.*, 446 Pa. Super. 313, 673 A.2d 959, 961 (1996).

Plaintiffs' Petition to Open Judgments presents this Court with facts that were not presented to the judges who originally entered judgments in the cases set forth in the Petition. The full significance of plaintiffs' new facts, moreover, emerges only with the benefit of an global view of the cases presented in this Petition. It is the pattern presented in these cases that is most compelling. The interests of judicial economy — and justice — are thus best served by having a single judge rule on this Petition.

1. *Preliminary Objections filed by Defendants in the Cunningham Case*

Defendants in the *Cunningham* case, KRN Associates, Dr. Arnold Kessler, Dr. Binder, Dr. Rubin, Dr. Hooshang Nikoo and Dr. Stephen Kessler, filed Preliminary Objections to the Omnibus Petition to Open Judgment. The Rules for Civil Procedure, however, do not provide for the filing of preliminary objections to a petition. Pennsylvania Rules of Civil Procedure 206.1 through 206.7 relate specifically to petitions. Rule 206.1 thus outlines the criteria for a petition, while Rule 206.2 provide for an "Answer" in response to a

petition. In the interest of judicial economy, and since plaintiffs have responded to the preliminary objections, this Court will address the substance of the preliminary objections. *Moran v. Paine, Webber, Jackson & Curtis*, 422 Pa. 66, 220 A.2d 624, 627, n.2 (1966).

Defendants initially object to the use of a petition to open a judgment. While, at first, this objection seemed to address procedural incorrectness, in fact these defendants pose the same substantive argument relating to the restrictions set by 42 Pa. C.S.A. §§ 5505 as to this Court's lack of jurisdiction to open the final judgment in this case.[82] Since this issue already has been addressed in Section (B.2), it will not be revisited.

Defendants also raise a more procedural, technical argument that the Petition is improperly verified and should thus be stricken. For the following reasons, this request must be denied as too extreme.

The rules relating to petitions require that "a petition or an answer containing an allegation of fact which does not appear of record shall be verified." Pa.R.C.P. 206.3 The note to this rule references Pa.R.C.P. 76 for a definition of 'verification'. "Verified," according to Pa.R.C.P. 76, "when used in reference to a written statement of fact by the signer, means supported by oath or affirmation or made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities." Pa.R.C.P. 76.

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82. Preliminary Objections of Defendants KRN Associates et al. re: *Cunningham*, Memorandum at II.A. (unnumbered memo).

Appendix A

The rules relating to verification of a petition or an answer to a petition were adopted in September, 1995, effective January 1, 1996. Defendants, however, cite a case decided in 1980, *Rupel v. Bluestein*, 280 Pa. Super. 65, 421 A.2d 406 (1980), in support of the argument that the Petition should be dismissed because the verification is improper. Plaintiffs also cite relatively old cases. It is therefore necessary to turn to this precedent.

Although a petition is not a pleading, the Superior Court has focused on Pa.R.C.P. 1024, which relates to verification of complaints, for guidance on the proper verification for a petition. *Monroe Contract Corp. v. Harrison Square, Inc.*, 266 Pa. Super. 549, 405 A.2d 954, 957 (1979). Rule 1024 provides, in relevant part, that:

> The verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of his information as to matters not stated upon his own knowledge and the reason why the verification was not made by a party. Pa.R.C.P. 1024(c).

Defendants argue that the verification is improper because "the Cunninghams have failed to submit any

verification."[83] In fact, plaintiffs have submitted a verification signed by their counsel. The Superior Court has stated that counsel may sign the verification in certain circumstances when the criteria of Rule 1024(c) are met. *Lewis v. Erie Ins. Ex.*, 181 Pa. Super. 193, 421 A.2d 1214, 1217 n.2 (1980); *Monroe Contract Corp. v. Harrison Square, supra*, 405 A.2d at 958.

Plaintiffs' verification does not adhere to 1024(c) since their counsel did not specifically state that conditions (1) and (2) of Rule 1024(c) were met as the prerequisite for counsel giving the verification based on "sufficient knowledge" or "information." However, defendants' verification, which is given by their counsel, is also defective since counsel merely states that "defendants are not available to sign this verification within the time period required by the Pennsylvania Rules of Civil Procedure." He does not indicate, as required by Pa.R.C.P. 1024(c)(2), that they are "outside the jurisdiction of the court."[84] The Superior Court has held that a party waives his objections to an unverified petition if his answer is also unverified. *Cross v. 50th Ward Community Ambulance Co.*, 365 Pa. Super. 74, 528 A.2d 1369, 1370 n.2 (1987). By extension, it would seem that a party who files an answer with a defective verification should waive objections to the improperly verified petition.

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83. Defendants KRN Assoc. et al Preliminary Objections re: *Cunningham*, Memorandum at 12. Other defendants have likewise raised this issue concerning improper verification. See, e.g., Answer of Defendant Albert Einstein Medical Center re: *Silverstein*, Memorandum at 10.

84. *See* Defendant KRN Associates, et al. Preliminary Objections re: *Cunningham* Verification.

In any event, courts have concluded that a petition should not be dismissed due to an improper verification without at least allowing a petitioner a right to amend. *Lewis v. Erie Ins., supra*, 421 A.2d at 1216-17. In so doing, it is emphasized that the technical rules of procedure must be balanced against the dictates of Pa.R.C.P. 126 which requires, in relevant part, that "rules should be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The Court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

Plaintiffs argue that their counsel took the verification for the Omnibus Petition because of its unique nature: "It is counsel, not their clients, who possess most of the material information averred in the various submissions to this court."[85] Moreover, because much of the information presented in the Petition is already "of record," they argue that, under Pa.R.C.P. 206.3, a verification was not necessary. Nonetheless, they submitted a verification by counsel based either on his sworn affidavit or on other documentary exhibits presented.

This case, therefore, is similar to *Monroe v. Harrison Square, supra*, where counsel submitted the verification in support of a petition to open a default judgment. The Superior Court agreed that the verification was improper because the attorney had stated that the party was without knowledge

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85. Answer of Plaintiffs to KRN Assoc.'s Preliminary Objections, Memorandum at 3.

but did not also state that he was without information. Nonetheless, the Superior Court concluded the trial court erred in dismissing the petition on this ground. In the interest of judicial economy, the *Monroe* Court concluded, this technical error should not have been the basis for dismissing the petition. *Monroe*, *supra*, 405 A.2d at 958-59.

In a subsequent case, *Rupel v. Bluestein*, 280 Pa. Super. 65, 421 A.2d 406, 412 (1980), the Superior Court noted that in *Monroe* "we had little trouble finding that counsel had the right to verify the petition to open or strike the judgment." In *Rupel*, however, where the plaintiff obtained the drastic remedy of a preliminary injunction, the Court concluded that an improperly verified complaint could not support that injunction where the trial court had failed to take the requisite testimony and sworn statements.

Thus, under *Monroe*, it would be error to dismiss plaintiffs petition to open judgments because of the technical deficiencies that the plaintiffs have, in fact, remedied in their response to defendants' preliminary objections. First, plaintiffs convincingly explain that verification by counsel was necessary in this case because he — rather than the clients — had first-hand knowledge of the facts at issue in this Petition. Moreover, plaintiffs outline in copious detail the source of knowledge or information for each of the 20 paragraphs in the Petition. They also present sworn affidavits. *See* Plaintiffs' Petition, Memorandum at 4-6, Ex. "A". In the interest of judicial economy, therefore, defendants' preliminary objections as to the verification are denied.

Appendix A

2. *Motion to Dismiss for Failure to State a Claim filed by Defendants in the Martino Case*[86]

Defendants Panichelli and the Litvin firm, who are being sued for legal malpractice in the *Martino* case, argue that this Petition should be dismissed because Pa.R.C.P. 1007 does not provide for "instituting a legal or equitable action by means of an Omnibus Petition." Defendants Panichelli et al., Memorandum at 4.[87] Defendants are correct that Pa.R.C.P. 1007 provides for only two methods of initiating a civil action: writ of summons or complaint. They neglect to point out, however, that this petition would fall under Pa.R.C.P. 206.1, which provides:

> (a) A petition shall specify the relief sought and state the material facts which constitute the grounds therefor. Pa.R.C.P. 206.1

Moreover, the Rules of Civil Procedure specifically provide that a *petition* may be filed to gain relief from a judgment of non pros, which plaintiffs seek in this case. *See* Pa.R.C.P. 237.3. In Philadelphia, at the time plaintiffs' Petition was filed, a petition for extraordinary relief was the approved method for obtaining extensions of the

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86. Other defendants have joined in this motion. *See, e.g.*, Defendant John Murphy re: *Peck*; Defendant Albert Einstein Medical Center re: *Silverstein*.

87. This same argument has been raised by other defendants in their Answers to the Petition. *See, e.g.*, Answer of Defendant Thomas Jefferson University Hospital et al re: *Mercer*, Memorandum at 33-34.

discovery deadlines set down in case management orders. Defendants' arguments are thus unpersuasive.

In addition to this procedural argument, defendants raise the substantive argument that plaintiffs' Petition is not viable under 42 Pa.C.S.A. §5505. Since that argument has been previously addressed, it will not be revisited.

D. *MOTIONS TO DISQUALIFY COUNSEL*

Two distinct motions to disqualify counsel were filed by various defendants. In a motion filed by defendants in the *Cunningham* case (at control number 40618), defendants KRN Associates, Dr. Kessler, Dr. Binder, Dr. Rubin, Dr. Hooshang Nikoo and Dr. Stephen Kessler (hereinafter "Cunningham defendants") argue that Mr. Beasley should be disqualified because of a conflict of interest based on the plaintiffs' potential malpractice action due to the alleged negligence of Mr. Smith and the Beasley firm. These defendants invoke the comments to Rule of Professional Conduct 1.7.

The second motion to disqualify filed by "White and Williams, as attorneys for certain entities"[88] also claims that Mr. Beasley should be disqualified because of a conflict of interest as set forth in Rule of Professional Conduct 1.7. In addition, they claim that Mr. Beasley must be disqualified under Rule of Professional Conduct 3.7 because "as a witness in this case, Mr. Beasely is prohibited from representing any parties in the matter."[89] An analysis of these rules, however,

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88. Motion to Disqualify at Control Number 40528.

89. *Id.*, Memorandum at 2.

does not support defendants contention as they relate to the particular facts of plaintiffs' Petition to Open Judgments.

As a general principle, motions to disqualify opposing counsel are not favored and "the party seeking to disqualify opposing counsel bears the burden of clearly showing that continued representation would be impermissible." *Cohen v. Oasin*, 844 F. Supp. 1065, 1067 (E.D. Pa. 1994). The commentary to Rule 1.7, for instance, cautions that when dealing with conflicts of interest charged by an opposing party:

> Where the conflict is such as clearly to call into question the fair and efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. Commentary to R.P.C. 1.7.

Both motions to disqualify argue that Mr. Beasley should be disqualified as counsel because of a serious conflict of interest. The *Cunningham* defendants argue that this conflict derives from the plaintiffs' potential malpractice action against the Beasley firm. The "White and Williams" motion echoes this argument by asserting that Mr. Beasley's economic and professional interests are adverse to his clients because, *inter alia*, he has a strong interest in avoiding a legal malpractice claim. They also suggest that Mr. Beasley's contrary interests would have an adverse impact "concerning any future settlement

negotiations."[90] In their initial motions, defendants cite no precedent to support this argument though the Cunningham defendants reference the commentary to Rule 1.7 as follows:

> If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give the client detached advice. (Motion to Disqualify at Control Number 40618, Memorandum at 4.)

These arguments are unconvincing for several reasons. Common sense dictates that the plaintiffs and the Beasley firm have a strong interest in common in convincing a court to open the judgments that are at issue in the Omnibus Petition. The potential of a legal malpractice action would, if anything, serve as an incentive to work diligently to achieve a favorable result for the plaintiffs. The defendants' reference to the adverse consequences of Mr. Beasley's continued representation on settlement negotiations is quixotic when dealing with cases that have been dismissed. Finally, plaintiffs cite precedent which suggests that an attorney's potential negligence in an action does not necessarily disqualify him from continuing to represent his clients since a critical inquiry intent of Rule 1.7 is "to ensure a lawyer's loyalty to his client." *United Food and Commercial Workers*

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90. Motion to Disqualify at Control Number 40528, Memorandum at 7-9; Motion to Disqualify by *Cunningham* defendants, Memorandum at 2-4. This Court's ruling denying the motions to disqualify is limited to this moment in time and is without prejudice to the right to again raise disqualification in the future should there be a basis to do so.

Health and Welfare Fund, 781 F. Supp. 1067 (M.D.Pa. 1991).[91]

The defendants also rely on Rule 3.7 to argue that Mr. Beasley should be disqualified because he is a necessary witness as evidenced by his affidavit affixed to the omnibus petition.[92] This rule, however, specifically refers to testimony at a trial:

> A lawyer shall not act as an advocate at a *trial* in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or

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91. A case cited by defendants, *Lease v. Rubacky*, 987 F.Supp. 406 (E.D.Pa. 1997) , is distinguishable. In *Lease*, an attorney was disqualified from representing both himself and his client in a breach of contract action against an expert witness who refused to testify at the client's initial medical malpractice action, allegedly thereby causing that medical malpractice action to be dismissed. A key distinction is that the attorney and client in *Lease* were both *parties* with diverse interests. Moreover, their action was subsequent to the client's initial medical malpractice action that had been dismissed. The instant petition, in contrast, seeks to open the initial actions on behalf of the plaintiffs.

92. Motion to Disqualify at Control Number 40528, Memorandum 3-5.

> (3) disqualification of the lawyer would work substantial hardship on the client. R.P.C. 3.7 (emphasis added).

Once again, in analyzing this rule it is necessary to consider the actual facts of the Petition under consideration. Its resolution does not require a trial. Only if it is granted, and the judgments opened, will trials possibly take place. These trials obviously will focus on the issues raised in the plaintiffs' complaints, not on the instant Petition. Mr. Beasley would not then be called to testify as to the matters set forth in his affidavit. Moreover, Mr. Beasley's affidavit was not solely determinative of the decision to open the judgments in this case. Rather, the documented pattern of professional dereliction (as set forth in the docket entries), fraud (as set forth in letters to clients) and diagnosed depression (as set forth in Dr. Rieger's report) were compelling factors. The focus on the concrete facts before this Court strongly suggests that Rule 3.7 does not serve as a basis for disqualifying Mr. Beasley.

Another question presented, however, is whether the strictures in Rule 3.7 come into play prior to a trial, thereby precluding an attorney from offering testimony on his clients' behalf outside of a trial. Although defendants have cited cases that take a broad view of the applicability of Rule 3.7, these cases focus on precedent from other jurisdictions and facts that are distinguishable.[93] Plaintiffs, in contrast, persuasively

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93. Defendants cite two federal cases (from New Jersey and the 6th Circuit) that applied Rule 3.7 to preclude an attorney from (Cont'd)

cite *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 876 F.Supp. 710, 712 (E.D. Pa. 1995), which interpreted the Pennsylvania Rules of Professional Conduct to conclude that even if an attorney is a necessary witness, complete disqualification is not required. In that case, the attorney was able to "participate fully in all pre-trial and post-trial matters." Moreover, the Superior Court in *Com. v. Willis*, 380 Pa. Super. 555, 552 A.2d 682 (1988), *alloc. denied*, 522 Pa.583, 559 A.2d 527 (1989), in analyzing the newly enacted Professional Rule of Conduct 3.7(b) as compared to the prior Disciplinary Rules of the Code of Professional Responsibility, suggested a flexible approach in which an attorney whose testimony was necessary at trial could be replaced at trial by another attorney from his office (in this case the prosecutor's office), thereby enabling the critical testimony. *See generally Com v. Willis*, *supra*, 552 A.2d at 697-98 ("vicarious disqualification in general has been forcefully criticized and has been severely limited under the new Pennsylvania Rules of Professional Conduct").

(Cont'd)

representing his client during a pretrial stage where it was likely that he would have to testify at a trial. *See* Motion to Disqualify at Control Number 40528, Memorandum at 4, citing *Freeman v. Viccharelli*, 827 F. Supp. 300, (D.N.J. 1993); *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704 (6th Cir. 1982). These malicious prosecution cases are distinguishable, however, since the attorneys in both cases were key witnesses to issues that would be at the heart of the ultimate trial. As mentioned above, resolution of the instant Petition does not necessitate a trial. Indeed, the invitation to place plaintiffs here at war with both defendants and the Beasley firm on an issue of legal malpractice has been rejected. Moreover, the *Freeman* case relied on New Jersey precedent and the analysis of the Advisory Committees appointed by the New Jersey Supreme Court.

Based on the particular facts of this case — and its procedural posture — defendants' motion to disqualify counsel is denied.

Conclusion

Upon consideration of plaintiffs' Petition to Open Judgments and Provide Further Relief, its supporting documentation, Defendants' responses thereto, as well as the related motions that have been filed in response to Plaintiffs' Petition, Plaintiffs' Petition to Open Judgments and Provide Further Relief is granted.

DATE: August 20, 1998 BY THE COURT:

s/ John W. Herron, J.
JOHN W. HERRON

Appendix A

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

February Term 1998
No. 1164

In re Thomas Smith, Esquire

May Term 1995
No. 3867

Cunningham v. KRN Assoc. et al.

October Term 1994
No. 3971

Gault v. Norwood, M.D., et al.

July Term 1994
No. 821

Peck v. Childrens' Hospital of Philadelphia, et al.

October Term 1994
No. 2583

Foody v. Chairman, D.P.M. et al

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May Term 1995
No. 4594

Kerwin v. Copley Pharmaceutical, Inc. et al.

April Term 1996
No. 2436

Garner v. The Trustees of the University of Pennsylvania

November Term 1995
No. 1383

Mercer v. Thomas Jefferson University Hospital et al.

November Term 1995
No. 2116

Silverstein v. Ginsberg, D.O. et al.

January Term 1996
No. 0234

Durante v. O'Shea, M.D. et al.

September Term 1996
No. 502

Martino v. Panichelli, et al.

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September Term 1994
No. 928

Johnson et al. v. Cristol, M.D.

July Term 1996
No. 1010

Folger v. Dugan, M.D. et al.

October Term 1995
No. 3221

Harris et al. v. Chestnut Hill Hospital et al.

May Term 1994
No. 0964

Joyner et al. v. Patterson, D.O.

Order

AND NOW, this 20th day of August, upon consideration of the Petition for a Scheduling Order (Control #40527) filed by "Certain Defendants and Former Defendants," and Plaintiffs' response thereto, it is hereby ORDERED that this Motion is DENIED for the reasons set forth in a contemporaneously issued opinion.

BY THE COURT:

s/ John W. Herron
John W. Herron, J.

Appendix A

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

February Term 1998
No. 1164

In re Thomas Smith, Esquire

RELATING TO:

May Term 1995
No. 3867

Michael & Matthew Cunningham, Minors, and James & Mary Ann Cunningham, in their own right

v.

KRN Associates, et al.

ORDER

AND NOW, this 20th day of August, 1998, upon consideration of Plaintiffs' Petition for Extraordinary Relief in the Nature of an Omnibus Petition to Open Judgments and Provide Further Relief, and defendants' responses thereto, it is hereby ORDERED that this Petition is GRANTED for the reasons set forth in a contemporaneously issued Opinion. The orders docketed March 5, 1997 and May 1, 1997 dismissing this case are VACATED and the case

shall be set down for a case management conference within twenty (20) days from the date of this Order so that new scheduling deadlines can be set.

BY THE COURT:

s/ John W. Herron
JOHN W. HERRON, J.

Appendix A

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

February Term 1998
No. 1164

In re Thomas Smith, Esquire

RELATING TO:

October Term 1994
No. 3971

Stephen R. Gault, A Minor, and Stephen P.
and Karen M. Gault, in their own right

v.

Norwood, M.D. et al.

ORDER

AND NOW, this 20th day of August, 1998, upon consideration of Plaintiffs' Petition for Extraordinary Relief in the Nature of an Omnibus Petition to Open Judgments and Provide Further Relief, and defendants' responses thereto, it is hereby ORDERED that this Petition is GRANTED for the reasons set forth in a contemporaneously issued Opinion. The orders docketed on December 18, 29 and 31, 1997, dismissing this case are vacated and the case

shall be set down for a case management conference within twenty (20) days from the date of this Order so that new scheduling deadlines can be set.

BY THE COURT:

s/ John W. Herron
JOHN W. HERRON, J.

Appendix A

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

February Term 1998
No. 1164

In re Thomas Smith, Esquire

RELATING TO:

July Term 1994
No. 821

Brian Peck, a Minor, and Kevin and Mary Peck,
in their own right

v.

Children's Hospital of Philadelphia, et al.

ORDER

AND NOW, this 20th of August, 1998, upon consideration of Plaintiffs' Petition for Extraordinary Relief in the Nature of an Omnibus Petition to Open Judgments and Provide Further Relief, and defendants' responses thereto, it is hereby ORDERED that this Petition is GRANTED. The orders docketed on December 9 & 19, 1997 dismissing this case are vacated and the case shall be set

down for a case management conference within twenty (20) days from the date of this Order so that new scheduling deadlines can be set.

BY THE COURT:

s/ John W. Herron
JOHN W. HERRON, J.

APPENDIX B — OPINION, ORDERS AND AMENDED ORDER OF THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CIVIL TRIAL DIVISION DATED SEPTEMBER 18, 1998

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

February Term 1998
No. 1164

In re Thomas Smith, Esquire

May Term 1995
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October Term 1994
No. 3971

Gault v. Norwood, M.D., et al.

July Term 1994
No. 821

Peck v. Childrens' Hospital of Philadelphia, et al.

October Term 1994
No. 2583

Foody v. Chairman, D.P.M. et al

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April Term 1996
No. 2436

Garner v. The Trustees of the University of Pennsylvania

November Term 1995
No. 1383

Mercer v. Thomas Jefferson University Hospital et al.

January Term 1996
No. 0234

Durante v. O'Shea, M.D. et al.

September Term 1996
No. 502

Martino v. Panichelli, et al.

September Term 1994
No. 928

Johnson et al. v. Cristol, M.D.

November Term 1995
No. 2116

Silverstein v. Ginsberg, et al.

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July Term 1996
No. 1010

Folger v. Dugan, M.D. et al.

October Term 1995
No. 3221

Harris et al. v. Chestnut Hill Hospital et al.

OPINION

On August 20, 1998, this court issued an opinion and orders opening judgments or rescheduling discovery in 13 cases after a careful review of the record and case law, especially *Estate of Gasbarini v. Medical Center of Beaver Cty.*, 487 Pa. 266, 409 A.2d 343 (1979). In so doing, it emphasized the uniqueness of the facts presented and the relative dearth of state precedent on point. Various defendants have subsequently filed motions for reconsideration, or in the alternative, permission to file an appeal of an interlocutory order.[1] The motions for reconsideration are denied, because this ruling was entered into after careful deliberation and the defendants' reconsideration arguments are ultimately unpersuasive. Because of the uniqueness of this case, however, defendants' motions for permission to file an interlocutory appeal will be granted.

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1. The caption reflects those cases within Plaintiffs' original Omnibus Petition in which motions for reconsideration or for permission to file an interlocutory appeal were filed.

Appendix B

Certain defendants (hereinafter the "White and Williams defendants") have premised their application for permission to appeal on the court's refusal to grant their petition for an order scheduling additional discovery despite its conclusion that the record was sufficient to establish the "extraordinary" cause requisite for the opening of judgments under *Gasbarini, supra*.[2] This court concluded that the plaintiffs had established that the judgments against them should be opened because of a pervasive *pattern* of professional dereliction, diagnosed depression and fraud of their attorney that was revealed in the record as a whole and supported by the docket entries of the 13 cases under review in the Omnibus Motion.[3] This global pattern over a relatively brief period of time was most striking and, ultimately, persuasive.

The White and Williams defendants claim that in reaching this conclusion the court relied on "information within the exclusive control and possession of Mr. Beasley."[4] As this court emphasized, however, its rulings did not hinge

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2. *See, e.g.*, Motion for Reconsideration or, in the alternative, Application for Certification for Immediate Appeal of defendants and former defendants represented by White and Williams, LLP (hereinafter Motion for Reconsideration of White and Williams Defendants).

3. *See In re Smith*, Memorandum Opinion, at 30-31, 68, 1. Although there were initially 14 cases presented in the Omnibus Petition, plaintiffs voluntarily withdrew one case, *Joyner v. Patterson*, May Term 1994, No. 0964.

4. Motion for Reconsideration of White and Williams Defendants, Memorandum at 2.

on allegations in Mr. Beasley's affidavits. "Rather, the documented pattern of professional dereliction (as set forth in the docket entries), fraud (as set forth in letters to clients) and diagnosed depression (as set forth in Dr. Rieger's report) were compelling factors.[5] This evidence, combined with other evidence of attorney fraud and professional dereliction on record,[6] was sufficient to justify the serious remedy of opening the judgments at issue in Plaintiffs' Omnibus Petition.

In denying defendants' Motion for a Scheduling Order for discovery, this court concluded that the extensive discovery requested was not material to the central issues presented in the Omnibus Petition. The White and Williams defendants now argue, however, that this court misconstrued the scope of their requested discovery as "targeting only Mr. Beasley's apparent legal malpractice" when, in fact, "the requested discovery was primarily related to Mr. Beasley's claims that Mr. Smith had a mental breakdown and that his mental breakdown caused him to neglect his professional

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5. *In re Smith*, Memorandum Opinion at 68. For a discussion of Mr. Smith's fraudulent letters to his clients, see *In re Smith*, Memorandum Opinion at 19-21. Plaintiffs also presented evidence that Mr. Smith had failed to inform his colleagues of the dire status of his cases. *Id.* at 25, n. 37.

6. For an analysis of the evidence, *see generally In re Smith*, Memorandum Opinion (August 20, 1998), which is incorporated by reference. The plaintiffs present a concise summary of varied evidence weighed in that opinion. *See* Plaintiffs' Response in Opposition to the Motion for Reconsideration of White and Williams Defendants, Memorandum at 1-3, 8-10.

duties and conceal the entry of judgments against his clients."[7] As this court emphasized, however, Mr. Smith's alleged mental breakdown was but one factor in its finding of extraordinary cause. Moreover, plaintiffs had supported this assertion with Dr. Rieger's letter of diagnosis. The key consideration for this court was always the broad pattern of professional dereliction and fraud over a relatively brief period of time. It was this pattern that was so significant; it was this pattern which severely prejudiced the plaintiffs by derailing their cases.

Defendants invoke procedural rules and case law to buttress their arguments that the court erred in denying their motion for a scheduling order. An analysis, however, reveals that neither are apposite or ultimately persuasive. In arguing that their request for discovery was improperly denied, defendants cite, inter alia, Pa.R. C. P. 206.7(d).[8] Yet the defendants' own quotation of this rule clearly indicates the court's discretionary role in allowing discovery since it provides that "the respondent may take depositions, or such other discovery *as the court allows.*"[9] Moreover, Pa.R.C.P. 206.7(c) likewise emphasizes that a petitioner may take discovery "*as the court allows*" where an answer is filed

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7. Motion for Reconsideration of White and Williams Defendants, Memorandum at 4.

8. Motion for Reconsideration of White and Williams Defendants, Memorandum at 8.

9. Motion for Reconsideration of White and Williams Defendants, Memorandum at 8, citing Pa.R.C.P. 206.7(d) (emphasis added).

raising disputed issues of *material* fact." For this court, the extreme pattern of professional dereliction, fraud, combined with diagnosed depression, (all occurring during a relatively short time period) were the material facts. The discovery defendants seek concerning Mr. Smith's mental breakdown might shed light on an element within this pervasive pattern — but it would not be relevant to minimizing its impact on the fate of the plaintiffs' cases. Moreover, a key consideration was necessarily the potential prejudice to all parties. After analyzing this key issue, this court concluded that opening the judgments would not seriously prejudice the defendants when contrasted to the fatal prejudice suffered by the plaintiffs as outlined in the unique, extreme facts of their Omnibus Petition.[10]

Defendants' reliance on case law to support their claim that denial of their motion for a scheduling order violated their rights to due process proves equally unpersuasive. They rely on *Reading Anthracite Co. v. Rich*, 525 Pa. 118, 577 A.2d 881, 885 (1990) to support the proposition that "in disposing of an action in equity on the merits, it is mandatory that the Rules of Civil Procedure be followed before final relief is granted."[11] Yet the rules cited by defendants were followed. As previously discussed, Pa.R.C.P. 207.6(d) gives the court discretion to provide for discovery as it "allows." Moreover, the facts of *Reading Anthracite* are completely

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10. *See In re Smith*, Memorandum Opinion at 33-37, 46-48 (analyzing the relative prejudice of the parties).

11. Motion for Reconsideration of White and Williams Defendants, Memorandum at 9.

inapposite to the present case.[12] *Reading Anthracite*, for instance, did not involve denial of a discovery request and thus provides no insight as to this particular issue. It also did not involve the opening of judgments which thereby allowed 13 cases to proceed on for a disposition on their merits. Rather, in *Reading Anthracite* a court ordered a special shareholders meeting and provided that one of the shareholders would be free to vote his shares of stock without consideration of a stock pooling agreement that had been in dispute. Moreover, in so doing, the Chancellor violated Pa.R.C.P. 227.1 when he failed to consider exceptions that had been filed in response to an adjudication and decree nisi. *Reading Anthracite*, 577 A.2d at 882, 884-885. As the Supreme Court observed, these rules were mandatory and the court violated it by granting "permanent injunctive relief during consideration of Petitioners' exceptions" which the Supreme Court properly characterized as "akin to entering an order directing that a litigant's house be torn down while his exceptions are still under consideration." *Id.*, 577 A.2d at 885.

The relevance of the other case cited by defendants, *Eastern Pennsylvania Psychiatric Inst. v. Russell*, 77 Pa.Cmw. 390, 465 A.2d 1313 (1983) is more problematic due to the schematic discussion of the discovery issues raised by employees in that case. This case involves an appeal by the Department of Public Welfare of a decision by the Pennsylvania State Civil Service Commission's ruling on the furloughing of eighteen employees. The only reference

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12. Defendants, unfortunately, offer no explanation of how the facts of *Reading Anthracite* are relevant to the particular issue they raise: denial of a discovery request.

to discovery requests, however, concludes that the employees' claim that they were denied due process by lack of pretrial discovery was baseless. The exact facts before the court, however, were not developed so that it offers little guidance on the issue raised by defendants. *See Id.*, 465 A.2d at 1319. For instance, although the Commonwealth court notes that "some adequate form of discovery was allowed," the only discovery outlined was that "counsel for the employees was allowed to review documents in an adequate manner prior to the hearing." *Id.* Moreover, the court emphasized that it was confronted with the issue of the scope of discovery before an administrative hearing. *Id.* Defendants thus fail to marshal appellate precedent addressing the proper scope of discovery for the instant case in which they seek discovery on the relative mental crisis of an attorney who failed to respond to 18 summary judgment motions and 3 motions in limine resulting in the dismissal of 13 cases during a relatively short time period.[13]

The practical effect of the August 20, 1998 orders granting Plaintiffs' Omnibus Petition, it should be remembered, is not to deny any party discovery on the merits of the claims asserted by plaintiffs. Although defendants suggest that it was error to grant this Petition because discovery at this juncture will reveal that at least some of plaintiffs' cases were without merit,[14] the best method for making this determination is to place these cases back on

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13. *In re Smith*, Memorandum Opinion at 5, n.6.

14. *See* Motion for Reconsideration of the White and Williams Defendants, Memorandum at 6 & Exs. A & B.

track where they will prevail — or fail — on their merits either at trial or prior to trial.

Conclusion

For these reasons, the arguments of the defendants concerning the denial of their motion for a scheduling order are unpersuasive. The uniqueness of this case, however, is undisputed. There is, therefore, "substantial ground for difference of opinion" and, in the interest of fairness and materially advancing the ultimate termination of this matter, this court will grant defendants' Application for Permission to Appeal its interlocutory Order granting the plaintiffs' Omnibus Petition[15] and denying defendants' petition for a Scheduling Order.

DATE: *September 18, 1998*

BY THE COURT:

s/ John W. Herron
JOHN W. HERRON

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15. Although the Memorandum presented by the White and William defendants focuses solely on this court's denial of their Motion for a Scheduling Order, they also present a proposed order seeking permission to appeal the order granting Plaintiffs' Omnibus Petition. Moreover, various other defendants also seek review of this order as well.

Appendix B

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

February Term 1998
No. 1164

In re Thomas Smith, Esquire

May Term 1995
No. 3867

Cunningham v. KRN Assoc. et al.

October Term 1994
No. 3971

Gault v. Norwood, M.D., et al.

July Term 1994
No. 821

Peck v. Childrens' Hospital of Philadelphia, et al.

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Durante v. O'Shea, M.D. et al.

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September Term 1994
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Johnson et al. v. Cristol, M.D.

July Term 1996
No. 1010

Folger v. Dugan, M.D. et al.

October Term 1995
No. 3221

Harris et al. v. Chestnut Hill Hospital et al.

ORDER

AND NOW, this 18th day of September, 1998, upon consideration of the Motion for Reconsideration of Defendants and Former Defendants represented by White and Williams LLP, and plaintiffs' response thereto, it is ordered that this motion is DENIED for reasons set forth in the Memorandum Opinions of August 20, 1998 and September 18, 1998.

BY THE COURT:

s/ John W. Herron
JOHN W. HERRON, J.

Appendix B

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

February Term 1998
No. 1164

In re Thomas Smith, Esquire

May Term 1995
No. 3867

Cunningham v. KRN Assoc. et al.

October Term 1994
No. 3971

Gault v. Norwood, M.D., et al.

July Term 1994
No. 821

Peck v. Childrens' Hospital of Philadelphia, et al.

October Term 1994
No. 2583

Foody v. Chairman, D.P.M. et al

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April Term 1996
No. 2436

Garner v. The Trustees of the University of Pennsylvania

November Term 1995
No. 1383

Mercer v. Thomas Jefferson University Hospital et al.

January Term 1996
No. 0234

Durante v. O'Shea, M.D. et al.

September Term 1996
No. 502

Martino v. Panichelli, et al.

September Term 1994
No. 928

Johnson et al. v. Cristol, M.D.

July Term 1996
No. 1010

Folger v. Dugan, M.D. et al.

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November Term 1995
No. 2116

Silverstein v. Ginsberg, et al.

October Term 1995
No. 3221

Harris et al. v. Chestnut Hill Hospital et al.

ORDER

AND NOW, this 18th day of September, 1998, upon consideration of the Applications by defendants for permission to appeal an Interlocutory Order pursuant to Pa.R.A.P. 1311(b), plaintiffs' response thereto, and for the reasons set forth in a contemporaneously filed Opinion, it is hereby ORDERED that this Application is **GRANTED** and the orders entered in the above captioned cases granting Plaintiffs' Omnibus Petition and denying Defendants' Petition for a Scheduling Order are AMENDED to include the following:

AMENDED ORDERS

> This court certifies that its Orders entered August 20, 1998 granting Plaintiffs' Omnibus Petition and denying Defendants' Petition for a Scheduling Order in the above captioned matter, involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the

orders may materially advance the ultimate termination of this matter, within the meaning of section 702(b) of the Judicial Code, 42 Pa.C.S.A. §702(b).

It is further ORDERED that a STAY is imposed on these cases pending disposition of any appeal that may be granted.

BY THE COURT:

s/ John W. Herron
JOHN W. HERRON, J.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA DENYING PERMISSION TO APPEAL DATED JANUARY 20, 1999

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 106 MDE 1998
(C.P. PHILADELPHIA COUNTY
1164 FEBRUARY 1998

IN RE: THOMAS W. SMITH, ESQ.
RELATING TO: CATHY ANN GARNER

v.

TRUSTEE OF THE UNIVERSITY
OF PENNSYLVANIA, et al.

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 109 MDE 1998
(C.P. PHILADELPHIA COUNTY
1164 NOV. TERM 1995

IN RE: THOMAS W. SMITH, ESQ.
RELATING TO: JOHN E. MERCER

v.

THOMAS JEFFERSON UNIVERSITY
HOSPITAL, et al

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IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 110 MDE 1998
(C.P. PHILADELPHIA COUNTY
1164 FEB TERM, 1998
3867 MAY TERM 1995

IN RE: THOMAS W. SMITH, ESQ.

v.

MICHAEL CUNNINGHAM, et al.

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 113 MDE 1998
(C.P. PHILADELPHIA COUNTY
C.P. 4594 MAY TERM, 1995)

IN RE: THOMAS W. SMITH, ESQ.
RELATING TO: JEROME KERWIN, EXECUTOR
OF THE ESTATE OF HELEN T. KERWIN,

v.

COPLEY PHARMACEUTICAL, INC.
AND THRIFT DRUG, INC.

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IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 116 MDE 98
(C.P. PHILADELPHIA COUNTY
1164 FEBRUARY 1998

IN RE: THOMAS W. SMITH, ESQ.
RELATING TO: STEPHEN R. GAULT, A MINOR BY HIS PARENTS AND NATURAL GUARDIANS, STEPHEN JP. GAULT AND KAREN M. GAULT AND IN THEIR OWN RIGHT

v.

WILLIAM I. NORWOOD, M.D., CHILDREN'S SURGICAL ASSOCIATES, LTD., et al.

ORDER

The court hereby **DENIES** the petitions for permission to appeal.

PER CURIAM

Date: January 20, 1999

APPENDIX D — ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA GRANTING MOTION TO QUASH APPEALS DATED JANUARY 20, 1999

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 3008 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
APRIL TERM, 1996
2436)

NO. 3021 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
FEBRUARY TERM 1998
1164
May Term, 1995
3867)

NO. 3022 PHILADELPHIA 1998
(C.P. PHILADELPHIA COUNTY
OCTOBER TERM, 1994
3971)

NO. 03023 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
OCTOBER TERM, 1994
3971)

No. 3024 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
JULY TERM, 1994
821)

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No. 3025 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
JULY TERM, 1994
821

No. 3026 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
NOV. TERM, 1995
2116)

No. 3042 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
SEPTEMBER TERM, 1996
502)

No. 3043 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
FEB. TERM, 1998
1164)

No. 3048 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
FEB. TERM, 1998
1164
NOV. TERM, 1995
2116)

No. 3079 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
FEBRUARY TERM, 1998
1164

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No. 3085 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
FEBRUARY TERM, 1998
1164)

No. 3090 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
FEBRUARY TERM, 1998
1164)

No. 3091 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
FEBRUARY TERM, 1998
1164)

No. 3092 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
FEBRUARY TERM, 1998
1164)

No. 3121 Philadelphia 1998
(C.P. PHILADELPHIA COUNTY
FEBRUARY TERM, 1998
1164
MAY TERM, 1996
3867
JANUARY TERM, 1996
234
APRIL TERM, 1996
2436
OCTOBER TERM, 1994
3971

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OCTOBER TERM, 1995
3221
SEPTEMBER TERM, 1994
928
MAY TERM, 1995
4594
NOVEMBER TERM, 1995
1383
JULY TERM, 1994
821
NOVEMBER TERM, 1995
2116)

IN RE: THOMAS W. SMITH, ESQ.
RELATING TO: CATHY ANN GARNER

v.

TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA
LEONARD D. MILLER, M.D.

ORDER

The court hereby **GRANTS** the motion to quash filed at the above appeals.

The appeals at Nos. 3014, 3015, 3016, 3017 Philadelphia 1998 are hereby **QUASHED** by this court sua sponte.

PER CURIAM

Date: January 20, 1999

APPENDIX E — ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR PERMISSION TO APPEAL DATED OCTOBER 25, 1999

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 34 E.D. Misc. Dkt. 1999

Petition for Permission to Appeal; Motion of Respondents, Plaintiffs in the Underlying Cases, for Dismissal of Petition for Permission to Appeal of the Case of Harris v. Chestnut Hill Hospital, et al. (Phila. County, October Term 1995, No. 3221), as a settlement agreement has been reached by and between all Parties to the Harris Case

IN RE THOMAS W. SMITH, ESQUIRE,

RELATING TO:

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES and MARY ANN CUNNINGHAM, in their own right

v.

KRN ASSOCIATES, ARNOLD S. KESSLER, M.D., DAVID BINDER, M.D., S. BRUCE RUBIN, M.D., HOOSHANG NIKOO, M.D., STEPHEN L. KESSLER, M.D., and NAZARETH HOSPITAL

Appendix E

KAREN A. DURANTE

v.

BARBARA M. O'SHEA, M.D. and
CHESTNUT HILL HOSPITAL

CATHY ANN GARNER

v.

TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA
and LEONARD D. MILLER, M.D.

STEPHEN P. GAULT and KAREN M. GAULT, as parents and natural guardians of STEPHEN P. GAULT, and STEPHEN R. GAULT and KAREN M. GAULT, individually

v.

WILLIAM I. NORWOOD, M.D., CHILDREN'S SURGICAL ASSOCIATES LTD., HERALDO MORA, M.D., NORBERT FROESE, M.D., DAVID R. JOBES, M.D., and CHILDREN'S HOSPITAL OF PHILADELPHIA

PATRICIA K. HARRIS, EXECUTRIX OF THE
ESTATE OF GEORGE T. HARRIS, JR.

v.

CHESTNUT HILL HOSPITAL, RU-LIN KO TUNG, M.D.,
and CHESTNUT HILL PATHOLOGY ASSOCIATES

Appendix E

MARGARETTA FAYE JOHNSON, EXECUTRIX OF THE ESTATE OF FRANCIS DAVIS OBERHOLTZER

v.

JAMES L. CRISTOL, M.D.

JEROME KERWIN, EXECUTOR OF THE ESTATE OF HELEN T. KERWIN

v.

COPLEY PHARMACEUTICAL, INC. and THRIFT DRUG, INC.

BRIAN PECK, a minor, by and through his parents and natural guardians, MARY PECK and KEVIN PECK; MARY PECK and KEVIN PECK, individually

v.

CHILDREN'S HOSPITAL OF PHILADELPHIA, MARSHALL L. JACOBS, M.D., JOHN D. MURPHY, M.D., and SUSAN T. NICHOLSON, M.D.

IRVIN SILVERSTEIN and BETTY SILVERSTEIN

v.

ALBERT EINSTEIN MEDICAL CENTER and PHILIP C. GINSBERG, D.O.

Appendix E

PETITION OF: CHILDREN'S HOSPITAL OF PHILADELPHIA, NORBERT FROESE, M.D., NAZARETH HOSPITAL, CHESTNUT HILL HOSPITAL, TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA, LEONARD D. MILLER, M.D., WILLIAM I. NORWOOD, M.D., CHILDREN'S SURGICAL ASSOCIATES, LTD., DAVID R. JOBES, M.D., RU-LIN KO TUNG, M.D., CHESTNUT HILL PATHOLOGY ASSOCIATES, JAMES L. CRISTOL, M.D., COPLEY PHARMACEUTICAL, INC., MARSHALL JACOBS, M.D., JOHN D. MURPHY, M.D., SUSAN C. NICHOLSON, M.D., ALBERT EINSTEIN MEDICAL CENTER, and PHILIP C. GINSBERG, D.O.

ORDER

PER CURIAM:

AND NOW, this 25th day of October, 1999, the Petition for Permission to Appeal is denied. The "Motion of Respondents, Plaintiffs in the Underlying Cases, for Dismissal from Petitioners' Petition for Permission to Appeal of the Case of Harris v. Chestnut Hill Hospital, et al., etc." is dismissed as moot.

APPENDIX F — ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR ALLOWANCE OF APPEAL DATED OCTOBER 25, 1999

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

No. 103 E.D. Alloc. Dkt. 1999

Petition for Allowance of Appeal; Motion of Respondents, Plaintiffs in the Underlying Cases, for Dismissal of Petition for Permission to Appeal of the Case of Harris v. Chestnut Hill Hospital, et al. (Phila. County, October Term 1995, No. 3221), as a settlement agreement has been reached by and between all Parties to the Harris Case

IN RE THOMAS W. SMITH, ESQUIRE,

RELATING TO:

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES and MARY ANN CUNNINGHAM, in their own right

v.

KRN ASSOCIATES, ARNOLD S. KESSLER, M.D., DAVID BINDER, M.D., S. BRUCE RUBIN, M.D., HOOSHANG NIKOO, M.D., STEPHEN L. KESSLER, M.D., and NAZARETH HOSPITAL

Appendix F

KAREN A. DURANTE

v.

BARBARA M. O'SHEA, M.D. and
CHESTNUT HILL HOSPITAL

CATHY ANN GARNER

v.

TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA
and LEONARD D. MILLER, M.D.

STEPHEN P. GAULT and KAREN M. GAULT, as parents and natural guardians of STEPHEN P. GAULT, and STEPHEN R. GAULT and KAREN M. GAULT, individually

v.

WILLIAM I. NORWOOD, M.D., CHILDREN'S SURGICAL ASSOCIATES LTD., HERALDO MORA, M.D., NORBERT FROESE, M.D., DAVID R. JOBES, M.D., and CHILDREN'S HOSPITAL OF PHILADELPHIA

PATRICIA K. HARRIS, EXECUTRIX OF THE
ESTATE OF GEORGE T. HARRIS, JR.

v.

CHESTNUT HILL HOSPITAL, RU-LIN KO TUNG, M.D.,
and CHESTNUT HILL PATHOLOGY ASSOCIATES

Appendix F

MARGARETTA FAYE JOHNSON, EXECUTRIX OF THE ESTATE OF FRANCIS DAVIS OBERHOLTZER

v.

JAMES L. CRISTOL, M.D.

JEROME KERWIN, EXECUTOR OF THE ESTATE OF HELEN T. KERWIN

v.

COPLEY PHARMACEUTICAL, INC. and THRIFT DRUG, INC.

BRIAN PECK, a minor, by and through his parents and natural guardians, MARY PECK and KEVIN PECK; MARY PECK and KEVIN PECK, individually

v.

CHILDREN'S HOSPITAL OF PHILADELPHIA, MARSHALL L. JACOBS, M.D., JOHN D. MURPHY, M.D., and SUSAN T. NICHOLSON, M.D.

IRVIN SILVERSTEIN and BETTY SILVERSTEIN

v.

ALBERT EINSTEIN MEDICAL CENTER and PHILIP C. GINSBERG, D.O.

Appendix F

PETITION OF: CHILDREN'S HOSPITAL OF PHILADELPHIA, NORBERT FROESE, M.D., NAZARETH HOSPITAL, CHESTNUT HILL HOSPITAL, TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA, LEONARD D. MILLER, M.D., WILLIAM I. NORWOOD, M.D., CHILDREN'S SURGICAL ASSOCIATES, LTD., DAVID R. JOBES, M.D., RU-LIN KO TUNG, M.D., CHESTNUT HILL PATHOLOGY ASSOCIATES, JAMES R. CRISTOL, M.D., COPLEY PHARMACEUTICAL, INC., MARSHALL JACOBS, M.D., JOHN D. MURPHY, M.D., SUSAN C. NICHOLSON, M.D., and ALBERT EINSTEIN MEDICAL CENTER

ORDER

PER CURIAM:

AND NOW, this 25th day of October, 1999, the Application for Leave to file Supplemental Submission in Support of Petition for Allowance of Appeal is denied. The Petition for Allowance of Appeal is denied. The "Motion of Respondents, Plaintiffs in the Underlying Cases, for Dismissal from Petitioners' Petition for Permission to Appeal of the Case of Harris v. Chestnut Hill Hospital, et al., etc." is dismissed as moot.

(2)

Supreme Court, U.S.
FILED
FEB 9 2000
CLERK

No. 99-1241

IN THE

Supreme Court of the United States

THE CHILDREN'S HOSPITAL OF PHILADELPHIA, NAZARETH HOSPITAL and NORBERT FROESE, M.D.,
Petitioners,

v.

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES CUNNINGHAM and MARY ANN CUNNINGHAM, individually; STEPHEN P. and KAREN M. GAULT, as parents and natural guardians of STEPHEN R. GAULT, and STEPHEN P. GAULT and KAREN M. GAULT, individually; BRIAN PECK, a minor, by and through his parents and natural guardians, MARY and KEVIN PECK and MARY PECK and KEVIN PECK individually,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR RESPONDENT SUSAN C. NICOLSON, M.D.

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6PP

LIST OF PARTIES

Petitioners in this Court are the Children's Hospital of Philadelphia, Nazareth Hospital, and Norbert Froese, M.D., Defendants in the underlying medical malpractice actions.

Respondents are Michael Cunningham, Matthew Cunningham, James Cunningham, Mary Ann Cunningham, Stephen P. Gault, Karen M. Gault, Stephen R. Gault, Brian Peck, Mary Peck and Kevin Peck, Plaintiffs in the underlying actions.

Respondents not joined in the Petition, but who are defendants in the underlying actions, are KRN Associates, Arnold S. Kessler, M.D., David Binder, M.D., S. Bruce Rubin, M.D., Hooshang Nikoo, M.D., Stephen L. Kessler, M.D., William I. Norwood, M.D., Children's Surgical Associates, Ltd., David R. Jobes, M.D., Marshall L. Jacobs, M.D., John D. Murphy, M.D., and Susan C. Nicolson, M.D.

Respondent Susan C. Nicolson, M.D. (Dr. Nicolson) supports the position of Petitioners and submits this Memorandum pursuant to Rule 12.6. For purposes of this Memorandum Dr. Nicolson adopts, without addition, the material in the Petition for A Writ of Certiorari ("Petition") under the headings "Question Presented," "Statement of Jurisdiction," and "Constitutional Provision Involved."

OPINIONS BELOW

Dr. Nicolson adopts the material in the Petition for A Writ of Certiorari under the heading "Opinions Below." In addition to the orders and opinions referenced in the Petition and attached thereto as Appendix B, the Court of Common Pleas separately denied Dr. Nicolson's motion for reconsideration on September 18, 1998 for the same reasons it denied Petitioners' motion for reconsideration. The September 18, 1998 order relating to Dr. Nicolson is unreported and reproduced at 1a.

STATEMENT OF THE CASE

Dr. Nicolson adopts the material in the Petition under the heading "Statement of The Case."

Dr. Nicolson is a defendant in the underlying case *Peck v. The Children's Hospital of Philadelphia,* No. 821, July Term 1994 filed in the Court of Common Pleas of Philadelphia County, Pennsylvania. The Trial Court granted summary judgment in favor of Dr. Nicolson as it had to the Petitioners. *See* Petition at 11a. Plaintiffs did not appeal.

In response to Plaintiffs' Petition to Open, Dr. Nicolson raised the same issues as did the Defendants who have filed the Petition For A Writ of Certiorari. Dr. Nicolson answered Plaintiffs' Petition To Open, denying plaintiffs' allegations, and joined in the Petition For A Scheduling Order, requesting discovery and an evidentiary hearing. After the Trial Court summarily granted Plaintiffs' Petition to Open and denied the Petition For A Scheduling Order, Dr. Nicolson sought reconsideration which the Trial Court denied. As did the Petitioners, Dr. Nicolson sought appellate review in the Superior

Court of Pennsylvania and the Supreme Court of Pennsylvania, both of which denied review. *See* Petition at 104a, 107a, 111a, 115a.

REASONS FOR GRANTING THE WRIT

Dr. Nicolson adopts the material in the Petition under the heading "Reasons For Granting the Writ." Pursuant to Rule 12.6, Dr. Nicolson supports the Petition inasmuch as she raised the same issues below. *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 783 n. 14 (1980); *Director, Office of Workers' Compensation Programs, U.S. Dept. Of Labor v. Perini North River Associates,* 459 U.S. 297, 300-305 (1983); *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,* 484 U.S. 135, 140 n. 8 (1987).

CONCLUSION

For these reasons, certiorari should be granted.

Respectfully submitted,

FREDRIC L. GOLDFEIN
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DEBORAH M. KNIGHT
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Attorneys for Respondent, Susan C. Nicolson, M.D.

APPENDIX

IN THE COURT OF COMMON PLEAS OF THE
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

In re Thomas Smith, Esquire	:	February Term, 1998 No. 1164
Re:		
Peck	:	July Term 1994 No. 821
v.	:	
Childrens' Hospital of Phila. et al.	:	**Docketed Civil Administration Sep 18 1998 C. KELLY Copies Mailed on 9/21/98**

ORDER

AND NOW, this 18th day of September, 1998, upon consideration of the Motion for Reconsideration of Defendant Susan C. Nicolson, M.D., it is ordered that this motion is DENIED for the reasons set forth in the Memorandum Opinions dated August 20, 1998 and September 18, 1998.

BY THE COURT:

/s/
JOHN W. HERRON

Supreme Court, U.S.
FILED
FEB 14 2000
CLERK

(3)

No. 99-1241

IN THE

Supreme Court of the United States

THE CHILDREN'S HOSPITAL OF PHILADELPHIA, NAZARETH HOSPITAL and NORBERT FROESE, M.D.,
Petitioners,

v.

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES CUNNINGHAM and MARY ANN CUNNINGHAM, individually; STEPHEN P. and KAREN M. GAULT, as parents and natural guardians of STEPHEN R. GAULT, and STEPHEN P. GAULT and KAREN M. GAULT, individually; BRIAN PECK, a minor, by and through his parents and natural guardians, MARY and KEVIN PECK and MARY PECK and KEVIN PECK, individually,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR RESPONDENTS MARSHALL L. JACOBS, M.D., WILLIAM I. NORWOOD, M.D. AND CHILDREN'S SURGICAL ASSOCIATES

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PACKARD PRESS® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

9pp

LIST OF PARTIES

The Petitioners in this Court are The Children's Hospital of Philadelphia, Nazareth Hospital and Norbert Froese, M.D. The Petitioners were Defendants in the underlying medical malpractice suits.

The Respondents are Michael Cunningham, Matthew Cunningham, James Cunningham, Mary Ann Cunningham, Stephen P. Gault, Karen M. Gault, Stephen R. Gault, Brian Peck, Mary Peck and Kevin Peck. The Respondents were Plaintiffs in the underlying medical malpractice suits.

The Defendants in the underlying medical malpractice suits who are not joined in the Petition are David Binder, M.D., Children's Surgical Associates, Ltd., Marshall L. Jacobs, M.D., David R. Jobes, M.D., Arnold S. Kessler, M.D., Stephen L. Kessler, M.D., KRN Associates, John D. Murphy, M.D., Susan T. Nicholson, M.D., Hooshang Nikoo, M.D., William I. Norwood, M.D. and Bruce Rubin, M.D.

The Respondents, Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd., support the Petitioners' Petition for a Writ of Certiorari and all averments contained therein and, as such, submit the following Memorandum pursuant to United States Supreme Court Rule 12.6. For the purposes of this Memorandum, the Respondents, Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd., incorporate the statements made in the Petitioners' Petition for a Writ of Certiorari which are contained under the "Question Presented," "Statement of Jurisdiction" and "Constitutional Provision Involved" sections of the Petition.

OPINIONS BELOW

Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd. adopt and incorporate herein the averments contained under the heading "Opinions Below" as written in the Petitioners' Petition for a Writ of Certiorari. Additionally, on September 18, 1998, the Philadelphia County Court of Common Pleas also denied Dr. Jacobs' Motion for Reconsideration. The Court of Common Pleas based its decision to deny Dr. Jacobs' Motion on reasons which were identical to those reasons given by the court for denying the Petitioners' Motion for Reconsideration. The September 18, 1998, Order denying Dr. Jacobs' Motion for Reconsideration is unreported, but has been reproduced in the Appendix to this Memorandum at page 1a. Moreover, for the same reasons, the Court of Common Pleas also denied the Motion for Reconsideration of Dr. Norwood and Children's Surgical Associates, Ltd., on September 18, 1998. The court's Order, dated September 18, 1998, denying the Motion for Reconsideration of Dr. Norwood and Children's Surgical Associates, Ltd., has not been reported, but has been reproduced in the Appendix to this Memorandum at page 2a.

STATEMENT OF THE CASE

Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd. endorse and incorporate in this Memorandum the statements contained under the heading "Statement of the Case" in the Petitioners' Petition for a Writ of Certiorari.

Furthermore, Dr. Jacobs is a defendant in *Peck v. Children's Hospital of Philadelphia,* No. 821, July Term 1994, one of the underlying cases in this matter which was instituted in the Court of Common Pleas of Philadelphia County in Pennsylvania. Just as the Petitioners' had been granted summary judgment against the Plaintiffs in this matter, the trial court had also granted summary judgment in favor of Dr. Jacobs and against the Plaintiffs. *See* the Petitioners' Petition for a Writ of Certiorari at 11a. The Plaintiffs never appealed the trial court's ruling to a higher court.

Additionally, Dr. Norwood and Children's Surgical Associates, Ltd. are defendants in the underlying matter of *Gault v. Children's Hospital of Philadelphia,* No. 3971, October Term 1994, which was instituted in the Court of Common Pleas of Philadelphia County in Pennsylvania. Similar to what occurred with the Petitioners, the trial court also granted summary judgment on behalf of Dr. Norwood and Children's Surgical Associates, Ltd and against the Plaintiffs in this matter. *See* the Petitioners' Petition for a Writ of Certiorari at 11a. The Plaintiffs did not appeal the trial court's ruling to a higher court.

After receiving the Plaintiffs' Petition To Open, Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. timely filed a Response, in which they denied all material allegations contained in the Plaintiffs' Petition. Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. also joined in the Petitioners' Petition for a Scheduling Order in an effort to conduct discovery and to obtain an evidentiary hearing. In their Response to the Plaintiffs' Petition To Open and in documents subsequently filed with the trial court, Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. raised issues which were identical to those asserted by the Petition-

ers in the Petition for a Writ of Certiorari. Nevertheless, notwithstanding these issues and requests, the trial court granted the Plaintiffs' Petition to Open and denied the Joint Petition for a Scheduling Order. Reconsideration of the trial court's ruling was sought and subsequently denied. Thereafter, Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. petitioned the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania for appellate review of the trial court's orders on the same grounds as those asserted by the Petitioners. However, both tribunals denied these requests for appellate review of the trial court's rulings. *See* the Petitioners' Petition for a Writ of Certiorari at 104a, 106a, 111a-117a.

REASONS FOR GRANTING THE WRIT

Marshall L. Jacobs, M.D., William I. Norwood, M.D. and Children's Surgical Associates, Ltd. incorporate in this Memorandum the statements contained under the heading "Reasons for Granting the Writ" in the Petitioners' Petition for a Writ of Certiorari. In accordance with Supreme Court Rule 12.6, Dr. Jacobs, Dr. Norwood and Children's Surgical Associates, Ltd. hereby endorse the Petition for a Writ of Certiorari as they raised the same issues in the courts below. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,* 484 U.S. 135, 140, n.8 (1987); *Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. Perini North River Associates,* 459 U.S. 297, 302-05 (1983); *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 783, n.14 (1980).

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE COURT OF COMMON PLEAS OF THE
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

In re Thomas Smith, Esquire	:	February Term, 1998 No. 1164
Re:		
Peck	:	July Term 1994 No. 821
v.		
Childrens' Hospital of Phila., et al.	:	**Docketed Civil Administration Sep 18 1998 C. KELLY Copies Mailed on 9/21/98**

ORDER

AND NOW, this 18th day of September, 1998, upon consideration of the Motion for Reconsideration of Defendant Marshall L. Jacobs, M.D., the Application for Reargument[1] en banc, and Plaintiff's response thereto, it is hereby ORDERED that this motion is DENIED for the reasons set forth in the Memorandum Opinions dated August 20, 1998 and September 18, 1998.

BY THE COURT:

/s/
JOHN W. HERRON

[1]Defendants do not request oral argument. Rather, they seek reconsideration en banc.

IN THE COURT OF COMMON PLEAS OF THE
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

In re Thomas Smith, Esquire	:	February Term, 1998 No. 1164
Re:		
Gault	:	October Term 1994 No. 3971
v.	:	
Norwood, M.D., et al.	:	**Docketed Civil Administration Sep 18 1998 C. KELLY Copies Mailed on 9/21/98**

ORDER

AND NOW, this 18th day of September, 1998, upon consideration of the Motion for Reconsideration of Defendants William Norwood, M.D. and Children's Surgical Associates, Ltd., their Application for Reargument[1] en banc, and Plaintiffs' response thereto, it is hereby ORDERED that this motion is DENIED for the reasons set forth in the Memorandum Opinions dated August 20, 1998 and September 18, 1998.

BY THE COURT:

/s/
JOHN W. HERRON

[1]Defendants do not request oral argument. Rather, they seek reconsideration en banc.

Supreme Court, U.S.
FILED
FEB 16 2000
CLERK

(4)

NO. 99-1241

IN THE
SUPREME COURT OF THE UNITED STATES

THE CHILDREN'S HOSPITAL OF PHILADELPHIA, NAZARETH HOSPITAL and NORBERT FROESE, M.D.,
Petitioners,

v.

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES CUNNINGHAM and MARY ANN CUNNINGHAM, individually; STEPHEN P. GAULT and KAREN M. GAULT, as parents and natural guardians of STEPHEN R. GAULT, and STEPHEN P. GAULT and KAREN M. GAULT, individually; BRIAN PECK, a minor, by and through his parents, MARY and KEVIN PECK, and MARY PECK and KEVIN PECK, individually,
Respondents.

On Petition for a Writ of Certiorari to the Court of Common Pleas of the First Judicial District of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF JURISDICTION

A. There is No Basis for Jurisdiction; Quite Obviously (and as Confirmed by the State Appellate Courts' Quashals of Defendants' Premature Appeals), the Trial Court's Orders Permitting the Underlying Cases to Proceed Were Not Final Orders

Petitioners (referred to herein as "defendants") purport to invoke this Court's jurisdiction based on the premise that the trial court's interlocutory orders of August 20, 1998, opening judgments and allowing the underlying cases to proceed towards trial, somehow constituted a "final judgment", reviewable under 28 U.S.C. § 1257. *See*, Petition for a Writ of Certiorari ("Defendants' Petition") at 2. Yet, that premise is unquestionably false. This matter is no more ripe for certiorari than it was for appeal in Pennsylvania. Indeed, defendants filed premature appeals to the Pennsylvania appellate courts, which were quashed. Now, rather than wait, as the law requires, until review in the State court system will be proper, defendants seek to bypass that system entirely. In doing so, they display a disregard for the Rules of this Court just as complete as the disregard they have shown for the Rules in Pennsylvania.

The statute, 28 U.S.C. § 1257, "establishes a firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 118 S.Ct. 481, 485, 139 L.Ed.2d 433 (1997). Specifically,

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

Id., 118 S.Ct. at 485-486, *quoting, Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). The orders here plainly are not final, in either sense.

As detailed in the Counter-Statement of the Case below, the trial court, in granting plaintiffs' Petition for Extraordinary Relief in the Nature of an Omnibus Petition to Open Judgments and Provide Further Relief ("Omnibus Petition"), opened judgments in the underlying cases and put those cases back on track, "to prevail — or fail — on their merits either at trial or prior to trial." *See*, 96a-97a. In doing so, the court also denied

defendants' Motion for a Scheduling Order to conduct certain discovery — and it is that ruling which is the basis for defendants' due process claim, and their Petition to this Court. Defendants' due process claim is frivolous on its face. Indeed, the trial court denied defendants' Motion because it properly concluded, *inter alia*, that the extensive discovery requested by defendants **was not even material** to the central issues presented in the Omnibus Petition. *See*, 92a. For instant purposes, however, the important point is that, even though defendants' due process claim is patently frivolous, review of that claim has **not** been foreclosed in the Pennsylvania courts. To the contrary, defendants were simply, and properly, not permitted to have that claim reviewed **prematurely**.

That is, defendants attempted to appeal the trial court's interlocutory orders of August 20, 1998 as of right, contending that they were final orders, and/or that they were interlocutory orders directly appealable under the Pennsylvania collateral order doctrine. Both contentions were plainly meritless, as it is well-settled under Pennsylvania law that orders opening

judgments are neither final orders, nor interlocutory orders appealable as of right. *See, Puricelli v. Puricelli*, 446 Pa. Super. 493, 667 A.2d 410, 412-414 (1995). Indeed,

> An order opening judgment, as in the instant case, does not end the litigation, nor preclude participation by certain parties in the litigation, nor result in the irreparable loss of the claim. On the contrary, **this order opens up the possibility of further litigation between the parties, while causing neither irreparable loss nor prejudice to Appellant. Review of the correctness of the trial court's action in opening the judgment is merely postponed to a later date.**

Joseph Palermo Dev. v. Bowers, 388 Pa. Super. 49, 564 A.2d 996, 998 (1989). (Emphases added). *Compare, Jefferson, supra*, 118 S.Ct. at 486 ("[t]he Alabama Supreme Court's decision [deciding federal question and remanding for resolution of state law claims] was not a 'final judgment.' It was avowedly interlocutory. ... Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims.").[1]

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[1] As further discussed below, the conclusion reached by this Court in *Jefferson*, that the requirements of 28 U.S.C. § 1257 were not satisfied, is even more obvious here. That is because the Alabama

Accordingly, the Pennsylvania Superior Court quashed defendants' premature appeals, as the law required. *See*, 107a-110a. The Pennsylvania Supreme Court then denied defendants' Petition for Allowance of Appeal from that decision. *See*, 115a-118a. (The appellate courts also denied defendants' attempt to seek discretionary review of the trial court's interlocutory orders. *See*, 104a-106a; 111a-114a).

These decisions must be echoed here. As the trial court observed:

> The practical effect of the August 20, 1998 orders granting Plaintiffs' Omnibus Petition, it should be remembered, is not to deny any party discovery on the merits of the claims asserted by plaintiffs. Although defendants suggest that it was error to grant this Petition because discovery at this juncture will reveal that at least some of plaintiffs' cases were without merit, ... the best method for making this determination is to place these cases back on track where they will prevail — or fail — on their merits either at trial or prior to trial.

See, 96a-97a. (Footnote omitted).

Supreme Court did, at least, hear and decide the merits of the federal claim in *Jefferson*, prior to remanding the matter for resolution of the state law claims. Here, instead, no Pennsylvania court has yet to even hear, much less to decide, any of defendants' claims on appeal.

Similarly, the effect of the rulings of the Pennsylvania appellate courts, quashing defendants' premature appeals of the interlocutory orders, and refusing to grant discretionary review, was not to deny defendants any appellate rights, including the "right" to raise frivolous due process claims, at the proper time.[2] That is, "if the [trial court's] decision on the federal claim ultimately makes a difference to the defendants" — in particular, if plaintiffs prevail at trial — then defendants may appeal, in Pennsylvania, and, of course, "they will be free to seek our review once the state-court litigation comes to an end." *Jefferson, supra*, 118 S.Ct. at 486.[3]

Thus, it is obvious that there was no "final judgment," as required under 28 U.S.C. § 1257. Defendants seek to evade this obvious fact by a grossly misplaced reliance on the

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[2] It is, thus, blatantly false for defendants to assert, instead, that "the constitutional question is not subject to further review in the State court proceedings" (*see*, Defendants' Petition at 2).

[3] If, conversely, defendants prevail and obtain judgments (this time on the merits), then, of course, the trial court's decision will not "make[ ] a difference" (*id.*), as defendants will then have the exact same result which they falsely claim, here, has been disturbed in violation of their due process rights.

exception set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). Specifically, there is "a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in lower state courts." *O'Dell v. Espinoza*, 456 U.S. 430, 102 S.Ct. 1865, 1866, 72 L.Ed.2d 237 (1982). Yet, the threshold requirement common to this "limited set of situations" is that "the highest court of a State has finally determined the federal issue ..." *Cox Broadcasting Corp., supra*, 95 S.Ct. at 1037.

Here, no such determination was made by any appellate court of Pennsylvania, much less by "the highest court." The exception is, therefore, inapplicable on its face.[4]

A final jurisdictional flaw should be noted. Defendants seek a writ of certiorari to the trial court. However, the controlling statute gives this Court jurisdiction only over final judgments or decrees rendered by "the highest court of a

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[4] Of course, even when this threshold requirement is satisfied (as it unquestionably is not here), that does not mean that the exception will, in fact, apply. For example, in *Jefferson, supra*, 118 S.Ct. at 486-87, the requirement was, apparently, satisfied, yet this Court held that the exception was, nonetheless, inapplicable.

State in which a decision could be had ..." 28 U.S.C. § 1257.

Defendants cite *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935)[5] and *Virginia Ry. Co. v. Mullens*, 271 U.S. 220, 46 S.Ct. 526, 70 L.Ed. 915 (1926), for the proposition that a trial court can satisfy this essential criterion. Yet, there is no question that the trial court in this matter cannot do so. The rule of these cases does no more, in essence, than to repeat the language of the statute, inapplicable here. That is, these cases involved situations in which there was a final judgment by the trial court and that judgment was not reviewed and thus became unreviewable by any state appellate court, making it a final judgment of the highest state court in which a decision could be had.

That certainly is not the case here. As shown above, the orders here were not final, as a matter of law. Furthermore, all aspects of those orders — including those which defendants

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[5] Defendants neglect to note that *Grovey* was expressly overruled by this Court in *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). It was overruled on the merits, not with respect to the jurisdictional issue. Nonetheless, proper citation to this fact should, obviously, have been made by the defendants.

falsely claim violated due process — may be reviewed once final judgment is rendered; as such, they are reviewable, as a matter of law. It is, then, axiomatic that the trial court is not the highest state court in which a decision could be had, and this essential requisite of 28 U.S.C. § 1257, too, cannot be met.

Accordingly, for all of the foregoing reasons, this Court clearly lacks jurisdiction over the matter at bar. Defendants' Petition must, therefore, be denied. Plaintiffs will, nonetheless, proceed to address the "merits" of that Petition, below.

COUNTER-STATEMENT OF THE CASE

A. In an Attempt to Fabricate an Issue Which This Court Can and Should Review, Where There is None, Defendants Have Utterly Misrepresented the Nature of the Proceedings, and the Trial Court's Interlocutory Decision, in this Matter

In making the equitable determination of whether to open its judgments, a trial court is not, of course, required to ignore dispositive facts incontestably established by the record before it. Nor, faced with those facts, is the court required to authorize a time-consuming and futile plan of discovery which will not and does not even purport to contradict them. Yet this

is precisely what the defendants contend the trial court was required to do, and which they assert provides reason for this Court to effectively overturn the decision of the Pennsylvania appellate courts not to hear this premature appeal. It does not.

Plainly put, there is no federal issue which this Court should (or even can) review in this case. Yet the defendants have attempted to fabricate one. They have done so by blatantly misrepresenting the nature of the proceedings, and of the trial court's interlocutory orders of August 20, 1998. Some of defendants' misrepresentations have already been corrected, *supra*. Plaintiffs will not attempt, here, to specifically address all of the other misrepresentations which permeate Defendants' Petition. For instant purposes, a simple but accurate summary of the case should prove more than sufficient.

This matter originally involved 14 civil actions, most of which were dismissed, unbeknownst to the plaintiffs, on 21 dispositive motions which plaintiffs' attorney, Thomas W. Smith, simply did not answer — as irrefutably established by

the pertinent docket entries.[6] When this was discovered, along with additional documented proof of Mr. Smith's abandonment of the cases and his fraud in concealing that abandonment, plaintiffs promptly moved for relief via the Omnibus Petition. The Petition detailed Mr. Smith's conduct and attached copious Exhibits showing his gross pattern of abandonment (*e.g.*, docket entries), fraudulent concealment (*e.g.*, correspondence, memoranda), and his mental state (*e.g.*, letter from Wolfram Rieger, M.D. to Friends Psychiatric Hospital, referring Mr. Smith for in-patient treatment of depression). Plaintiffs argued that, under Pennsylvania law, this pattern of abandonment, fraud, and Mr. Smith's mental illness each presented sufficient grounds for granting of the requested relief.

For 6 months the court received additional submissions — including at least 30 separate Responses to the Petition containing the arguments and information the defendants in

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[6] As the trial court accurately calculated, the docket entries showed that nearly all of the dispositive motions (17 of 21) which Mr. Smith failed to answer were filed in the space of two months, October and November of 1997. *See*, 6a-7a, n. 6.

each of the underlying cases thought most persuasive, followed by further replies and counter-replies which "continued until a few days" before the court issued its decision. *See*, 4a, n. 2. The court, as shown in its seventy page Memorandum Opinion ("Mem.Op.") dated August 20, 1998, considered the resulting mass of arguments and evidence scrupulously. For the reasons comprehensively detailed in that Opinion, the court granted the Omnibus Petition, opening the underlying judgments and putting the cases back on track, "to prevail — or fail — on their merits either at trial or prior to trial." *See*, 96a-97a.[7]

In seeking, now, a writ of certiorari, defendants offer "reasons" — as they did in their unsuccessful efforts to obtain premature review in the appellate courts of Pennsylvania — which essentially devolve to a single allegation: that the trial

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[7] By Opinion ("Op.II") and Orders dated September 18, 1998, the court denied defendants' motions for reconsideration but granted their request to seek a permissive, interlocutory appeal. As shown in the Counter-Statement of Jurisdiction above, both the Superior and Supreme Courts of Pennsylvania properly exercised their discretion not to prematurely review the matter. Furthermore, the Superior Court quashed the defendants' direct appeals, and the Supreme Court declined to review that legally mandated disposition.

court erred as a matter of law by granting the Omnibus Petition without allowing certain discovery requested by defendants. *See, e.g.*, Defendants' Petition at 4, 6-7. As will be shown below, this allegation is obviously meritless, indeed frivolous. However, the defendants seek to obscure this obvious truth behind a veil of false characterizations. Simply put, the case they portray is distorted beyond recognition.

For instance, reading Defendants' Petition, one would think that plaintiffs sought relief in the underlying cases based solely on the "alleg[ation] that [Mr. Smith] ... had **experienced a mental breakdown that caused him** to mishandle his clients' cases ..." *See*, Defendants' Petition at 3. (Emphases added).

That is, defendants focus exclusively on the cause of the gross pattern of extreme professional dereliction and fraud which plaintiffs contended warranted relief. They have virtually nothing to say about the pattern itself, which was incontestably established by the record and which the trial court properly found was dispositive. Furthermore, defendants repeatedly misrepresent that record, utterly ignoring pivotal and

undisputed documentary evidence (including, *inter alia*, the docket entries and defendants' own admissions), and instead erroneously describing a record consisting, essentially, of nothing more than "self-serving" allegations or evidence in plaintiffs' "exclusive control and possession". *See, id.* at i, 4, 6.

Most egregious, however, is defendants' blatant dishonesty in describing the trial court's decision. They characterize that decision as merely "accepting as true the self-serving facts alleged by the Plaintiffs", and as being "arbitrarily rendered" without affording defendants any opportunity to be heard. *See, id.* at 7, 13. *Also see, id.* at 4. The falsity of such characterizations was demonstrated beyond peradventure by the trial court itself, in two thoughtful and comprehensive Opinions discussed below.

REASONS FOR DENYING THE WRIT

The Writ should be denied summarily because, as already demonstrated, there clearly is no jurisdiction. However, even assuming *arguendo* that this Court can assume jurisdiction, it should not do so, for the following reasons.

A. Defendants Had No Right to Conduct the Proposed Discovery, Which was Not Designed, and Did Not Purport to be Designed, to Lead to the Resolution of a Genuinely Disputed Issue of Material Fact

1. The Essential Bases of the August 20, 1998 Ruling, and of Defendants' Petition

After examining a voluminous record submitted by the parties, the trial court concluded that the record established a documented pattern of professional dereliction and fraud by Mr. Smith. *See*, Mem.Op. at 23a, 27a, 29a, 35a, 48a-51a, 59a-60a, 63a, 65a, 76a. This pattern, to which the Court repeatedly referred (*id.*), was "the basis for opening" the judgments at issue. *Id.* at 60a. The pattern of fraud, established by, *inter alia*, Mr. Smith's letters to clients (*id.* at 22a-24a, 76a) and memoranda to his superior (*id.* at 29a, n. 37), was "but one of the factors justifying opening of the judgments" (*id.* at 27a, n. 35); another was the pattern of professional dereliction (*id.* at 60a, 76a), including "Mr. Smith's pattern of progressive abandonment of his cases during a discrete period" (*id.* at 63a), established by, *inter alia*, the docket entries (*id.* at 76a) reflecting his failure to respond to some 21 dispositive motions,

nearly all of which were filed within the space of two months (id. at 6a-7a, n. 6), as well as averments regarding his abandonment of cases prior to the dispositive-motion stage which were either admitted by defendants, explicitly or implicitly (*see, e.g., id.* at 49a-51a, 61a-62a), or were in some instances established by defendants' own documents (*see, e.g., id.* at 59a-60a). Moreover, many of defendants' Responses to the Omnibus Petition provided yet further proofs of Mr. Smith's abandonment of cases, and averred additional conduct by Mr. Smith which amounted to fraud upon the court.[8]

The court also concluded that the record showed the origin, the underlying reason or cause for the documented pattern of professional dereliction and fraud — Mr. Smith's mental or emotional problems during the pertinent time period, diagnosed as depression. *See*, Mem.Op. at 27a, 76a.

It must be emphasized that Defendants' Petition is based on the denial of discovery requests which focused on

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[8] The court, in its subsequent Opinion of September 18, 1998 ("Op.II"), made clear that all of this evidence was weighed in its Opinion of August 20, 1998. *See*, Op.II. at 92a, n. 6.

this final conclusion. Defendants' Petition at 6-7. As the trial court aptly phrased it, "[defendants] seek discovery on the relative mental crisis of an attorney who failed to respond to 18 summary judgment motions and 3 motions in limine resulting in the dismissal of 13 cases during a relative short time period." Op. II. at 96a. *Also see, id.* at 92a-93a.

In other words, defendants contend only that they were not permitted to conduct discovery which, in opposition to Dr. Rieger's diagnosis and common sense, they suggest may show that the cause of the documented pattern of dereliction and fraud established by the record was not any impairment suffered by Mr. Smith, but something else — a "sane" decision, perhaps, to abandon his clients' cases and his career. However, they do not, and cannot credibly, contend that the requested discovery could disestablish the documented pattern of dereliction and fraud itself.

In denying defendants' Motion for Reconsideration, the court, in its Opinion of September 18, 1998 ("Op.II"), further demonstrated the wholly false character of the assertions which

the defendants have repeated here. In particular, the court expressly confronted, and utterly disproved, defendants' allegations regarding the record and the bases of the court's decision of August 20, 1998. *See*, Op.II at 90a-96a. Moreover, the court again demonstrated, beyond peradventure, that the discovery requested by defendants was not material, that its denial was an incontrovertibly proper exercise of trial court discretion, and that defendants' claim of a due process violation was, in any event, baseless. *See*, *id.* at 92a-96a.

The trial court's analysis, in both Opinions, conclusively shows the complete lack of merit in defendants' position. So, too, will the following brief review of certain essentials of Pennsylvania law governing discovery and materiality.

2. The Rules Governing Discovery

The Pennsylvania Rules of Civil Procedure governing petitions provide that "'[t]he respondent may take depositions, or such other discovery as the court allows.'" Pa.R.Civ.P. 206.7(d). (Emphases added). As with the similar provision allowing the petitioner to take such discovery "as the court

allows" (Pa.R.Civ.P. 206.7(c)), Rule 206.7(d) further presumes that an answer has been filed "raising disputed issues of material fact." Pa.R.Civ.P. 206.7(c). That is, the Rules provide that the parties may take such discovery as the court allows if an answer has been filed raising disputed issues of material fact. *See*, Explanatory Comment - 1995 to Pa.R.Civ.P. 206.

Thus, a trial court, in determining whether to allow a respondent to conduct discovery under Rule 206.7, must determine, among other things, whether the respondent has raised any disputed issues of material fact, as to which the proposed discovery may be relevant. These determinations will, necessarily, involve the exercise of discretion.

3. The Definition of "Material" Fact

It is well-settled under Pennsylvania law that "[a] fact is material if it directly affects the disposition of a case." *Allen v. Colautti*, 53 Pa. Cmwlth. 392, 417 A.2d 1303, 1307 (1980). (Emphases added). In an instructive passage on this point, the Commonwealth Court of Pennsylvania rejected a

contention that the denial of certain allegations posed a bar to the granting of judgment on the pleadings, stating:

> Here we need only observe that it is only disputes as to material issues of fact which bar summary judgments. The facts disputed by the Petitioner simply are not material to any of the critical issues raised by Petitioner in his petition for relief. To put it another way, if these disputed issues were resolved in Petitioner's favor, he would be denied relief, nevertheless.

Pierce v. Com., Pennsylvania Bd. of Probation and Parole, 46 Pa. Cmwlth. 507, 406 A.2d 1186, 1188-89 (1979). (Emphasis on "material" in original; other emphases supplied).

4. Application - the Requested Discovery did Not Involve a Disputed Issue of Material Fact, and the Discretionary Ruling Not to Allow that Discovery was Clearly Proper

While not essential to the trial court's ruling, there really could be no genuine dispute that the underlying reason for the documented pattern of extreme dereliction and fraud in this matter lay in an impairment suffered by Mr. Smith. This was not only shown by the psychiatric evaluation of record, but by common sense. It simply is obvious that a lawyer with Mr.

Smith's decades of experience would have known that the failure to answer dispositive motions which resulted in the dismissal of nearly a dozen cases, most on motions filed within the space of two months, would, when discovered (along with his fraud in concealing those dismissals), lead to termination, probable disbarment, and, as a practical matter, the destruction of his career. It is self-evident that something in his mind must have been gravely amiss, to forfeit his livelihood in this way.

Nevertheless, even were it assumed *arguendo* that the defendants could show otherwise — that, through the proposed discovery, they could show a different cause for the pattern of dereliction and fraud established by the record — it would be a futile showing. That is because this hypothesized "proof" simply would not concern a material issue of fact.

An understanding that Mr. Smith was suffering such an impairment was certainly an important part of the full narrative — what the trial court referred to as the "global view" of the cases. *See*, Mem.Op. at 65a. And in fact, although the court only mentioned this factor twice in its Memorandum Opinion,

it properly cited it as one of the factors in its decision. *Id.* at 76a. *Also see, id.* at 27a; Op.II. at 96a. Yet there is no question that the decision would, and should, have been the same absent that factor. As shown above, the court repeatedly cited, as the basis for its decision, the documented pattern of dereliction and fraud — a pattern which existed regardless of the precise reason for it; and defendants do not and cannot contend that the proposed discovery could show otherwise.

This was made clear in the Memorandum Opinion, where "[i]n denying defendants' Motion for a Scheduling Order for discovery, this court concluded that the extensive discovery requested was not material to the central issues presented in the Omnibus Petition." *See*, Op.II. at 92a (Emphases added). However, in denying the Motion for Reconsideration, the court demonstrated this fact again, pointedly. Thus, discussing Pa. R.Civ.P. 206.7, the court noted that it provides for discovery:

> "*[A]s the court allows*" where an answer is filed raising disputed issues of *material* fact." For this court, the extreme pattern of professional dereliction, fraud, combined with diagnosed depression (all occurring during a relatively

> short time period) were the material facts. The discovery defendants seek concerning Mr. Smith's mental breakdown might shed light on an element within this pervasive pattern — but it would not be relevant to minimizing its impact on the fate of plaintiffs' cases.

Op.II. at 93a-94a. (Emphases in original). *Also see, id.* at 93a.

Thus, the proposed discovery did not involve a material fact because, even assuming it could prove all that defendants contend, that proof would not "directly affect the disposition of the case." *Allen, supra*, 417 A.2d at 1307. "To put it another way, if these disputed issues were resolved in [defendants'] favor, [they] would be denied relief, nevertheless." *Pierce, supra*, 406 A.2d at 1189. Hence, the discretionary decision not to allow defendants to conduct the time-consuming, intrusive, and immaterial discovery they proposed was eminently proper.

B. Defendants' Due Process Claim is Frivolous

Defendants' due process claim is based solely on this denial of their discovery requests. It is the same claim which they made in seeking, unsuccessfully, to obtain premature review in the appellate courts of Pennsylvania. As such, it must

be summarily rejected. Yet defendants contend that the trial court's eminently proper exercise of discretion was not only error, but deprived them of due process. That is absurd.

Denial of the proposed discovery was plainly warranted, for the reasons stated by the trial court itself. See, Op.II. at 93a-96a. The applicable law vests that court with authority to allow discovery, as appropriate, when certain predicates are met; they clearly were not met here. Thus, there is no question that the court properly exercised its discretion. Defendants' due process claim is, therefore, frivolous on its face.[9]

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[9] It should be noted that the cases cited by defendants, for the proposition that a final judgment constitutes a protected property right (*see*, Defendants' Petition at 9), are plainly inapposite, and indeed, they undermine defendants' argument here. For example, the first-cited case, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995), did not involve this issue at all. It dealt with a separation of powers question: whether a "legislative instruction to reopen [judgments] impinges upon the independent constitutional authority of the courts." *Id.*, 115 S.Ct. at 1460. This Court rejected, as irrelevant to that question, petitioners' argument based on Federal Rule of Civil Procedure 60(b). *Id.* In so doing, it observed that Rule 60(b) "merely reflects and confirms the courts' own inherent and discretionary power ... to set aside a judgment whose enforcement would work inequity. ... Thus, Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is always a denial of property without due process ..." *Id.* (Emphasis added). Defendants' reliance on *Plaut* is, therefore, not only confusing, it is self-defeating.

This is especially so given the current status of these proceedings. As further shown below, defendants clearly have not, in point of fact, been deprived of any cognizable property interest — much less have they been so deprived in a manner violative of their rights. Put another way: these defendants cannot even credibly contend that any legal prejudice has resulted, or will result, from the phantom denial of due process which they falsely allege occurred.

C. Defendants Have Not Shown, and Cannot Show, That They Will Suffer Any Prejudice Whatsoever by Having to Wait, as the Law Requires, Until Their Claims Can be Properly Raised on Appeal

In the trial court, defendants made either no claims of prejudice, asserted vague, conclusory claims, or merely urged that prejudice be presumed from the passage of time. Mem. Op., at 38a-41a. These claims were patently insufficient under Pennsylvania law, and the court properly disposed of them. *Id.*

Notably, the defendants, in their Petition to this Court, offer no argument on the issue of prejudice at all. They have not attempted to establish prejudice because they cannot do so.

Their silence speaks for itself. However, in concluding this Brief, plaintiffs must repeat an observation that goes to the rather simple essence of this issue.

Pursuant to the trial court's Orders, all of the underlying cases were set down for new case-management conferences. There are, now, various possible outcomes. For example, some of the cases may settle; others may go to trial and result in verdicts for plaintiffs — while yet others, theoretically, could end with judgments for the defense. There are, in any event, two certainties. One is that, if the proceedings are not further delayed by premature appeals, each of the cases will now be disposed of on the merits. The other is that defendants cannot possibly be prejudiced by this process. If, as some defendants have suggested, the cases lack merit, this will be shown soon enough, by dispositions in their favor. If, instead, any of the cases proceed to verdicts against the defendants, they may, then, appeal the very rulings they have complained of herein. As the trial court aptly observed:

> The practical effect of the August 20, 1998 orders granting Plaintiffs' Omnibus Petition, it should be remembered, is not to deny any party discovery on the merits of the claims asserted by plaintiffs. Although defendants suggest that it was error to grant this Petition because discovery at this juncture will reveal that at least some of plaintiffs' cases were without merit, ... **the best method for making this determination is to place these cases back on track where they will prevail — or fail — on their merits either at trial or prior to trial.**

Op.II. at 96a-97a. (Footnote omitted) (emphases added).

D. Defendants' Petition is Frivolous on its Face, and Rule 42 Sanctions Should be Imposed

The Rules of this Court provide, in pertinent part, that "[w]hen a petition for a writ of certiorari ... is frivolous, the Court may award the respondent ... just damages, and single or double costs under Rule 43. ..." *See*, Rules of the Supreme Court of the United States, Rule 42(2). Defendants' Petition, here, is the very definition of a frivolous filing.

As shown at the outset of this Brief, there is no good faith basis for these defendants even to claim that this Court can exercise jurisdiction, much less that it should do so. Yet, they attempt to evade this patent truth simply by asserting the

most patent falsehoods — brazenly asserting, for example, that the supposed "constitutional question" here "is not subject to further review in the State court proceedings" (*see*, Defendants' Petition at 2), when they know, as they must, that this is utterly and demonstrably false. As also shown above, even were there jurisdiction (and there is not), the "merits" of Defendants' Petition rest, similarly, on a foundation so obviously flawed as to be completely without integrity — that is, upon a fabricated claim of a phantom deprivation of rights from which no cognizable harm did or could result, as a matter of law.

In sum, defendants have chosen to burden this Court and the other parties to this litigation with a filing they know to be frivolous. They should, now, be held accountable, at least to the extent contemplated under the Rules, to deter such flagrantly frivolous filings in the future. Plaintiffs therefore request an award of just damages, in the form of attorneys fees and costs, in addition to any other relief or sanction this Court may deem appropriate.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that certiorari be denied, and that sanctions be imposed against defendants, and just damages awarded to plaintiffs, pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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No. 99-1241

IN THE

Supreme Court of the United States

THE CHILDREN'S HOSPITAL OF PHILADELPHIA, NAZARETH HOSPITAL and NORBERT FROESE, M.D.,

Petitioners,

v.

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES CUNNINGHAM and MARY ANN CUNNINGHAM, individually; STEPHEN P. and KAREN M. GAULT, as parents and natural guardians of STEPHEN R. GAULT, and STEPHEN P. GAULT and KAREN M. GAULT, individually; BRIAN PECK, a minor, by and through his parents, MARY and KEVIN PECK, and MARY PECK and KEVIN PECK, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

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I. The Trial Court's Order Satisfies the Finality Requirement of 28 U.S.C. § 1257

Plaintiffs acknowledge that this Court has held that certain state court decisions satisfy the finality requirement of 28 U.S.C. § 1257 even though there are further proceedings anticipated in the state court. *See* Resps.' Brief at 6-7. Plaintiffs, however, erroneously argue that this case does not fall within the finality requirement for such state court decisions as articulated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

In *Cox*, the Court took a pragmatic view of the finality requirement and identified four categories of cases in which a state court's decision on a federal issue satisfies 28 U.S.C. § 1257 despite further state court proceedings. The fourth category involves:

> those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83. In these cases "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and delayed justice. . . .' " *Cox*, 420 U.S. at 477-78.

In *Cox* itself, the Court reviewed a decision of the Supreme Court of Georgia upholding the constitutionality of a statute and remanding for trial on state law claims. The Court reasoned that "[the defendants] may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all." *Id.* at 485.

Similarly in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1962), the Court assumed jurisdiction over a case involving a federal venue statute despite the need for a subsequent trial in state court on the underlying state law claims. The Court reasoned that the federal question was a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 558. The Court further explained that:

> it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Id.

This case presents the same considerations that compelled this Court to accept jurisdiction over *Cox* and *Langdeau*. Here, the due process question is a "separate and independent matter, anterior to the merits" of the underlying medical malpractice actions. No other federal question will be decided in the medical malpractice actions. If Defendants prevail on the merits of the underlying actions, the Trial Court's denial of due process will not be subject to further review in the state courts. Moreover, if this Court reverses the Trial Court's order and requires fact-

finding proceedings, this litigation will end if Plaintiffs fail to meet their burden of proving a right to open the final un-appealed judgments: No trials in the underlying medical malpractice actions will be necessary. It thus serves the policy of the finality requirement to review Defendants' due process claims now rather than subject them to long and complex litigation that may prove to be unnecessary. It is the best way to avoid "the mischief of economic waste and delayed justice."

Further, the fact that the Trial Court, here, was the "highest court in which review could be had" does not affect the finality of the judgment under *Cox* and *Langdeau*. The "finality" and "highest court" requirements of 28 U.S.C. § 1257 are separate and distinct. As exemplified by *Grovey v. Townsend*, 295 U.S. 45 (1935), and *Virginia Railway Co. v. Mullens*, 271 U.S. 220 (1926), a state trial court may be the "highest court" for purposes of 28 U.S.C. § 1257 if the state appellate court denies discretionary review. Moreover, in *Cox*, the decision of the Supreme Court of Georgia, which this Court reviewed, was a discretionary appeal from an interlocutory order implicating First Amendment rights to freedom of speech. *See Cox*, 231 Ga. 60, 61, 200 S.E. 2d 127, 129 (1973). This Court's jurisdiction over an important federal question should not, as Plaintiffs suggest, be lost merely because the state's highest court has refused to exercise its discretion to review the Trial Court's order.

II. The Trial Court's Denial of Due Process Warrants a Grant of the Writ

Plaintiffs' Brief in Opposition raises tangential issues that skirt, and fail to refute, the fundamental procedural due process question raised by Defendants in their Petition for a Writ of Certiorari.

A. The Trial Court's Denial of a Hearing Is a Fundamental Due Process Violation

Plaintiffs' Brief mischaracterizes Defendants' due process claim as being "based solely on [the Trial Court's] denial of their discovery requests." Resps.' Brief at 23. Defendants' due process claim, though it includes the Trial Court's refusal to permit discovery, primarily challenges the Trial Court's refusal to permit *any* type of fact-finding proceeding prior to opening the final un-appealed judgments. The Trial Court's due process violation lies in its wholesale acceptance of the one-sided paper record presented by Plaintiffs' counsel without providing Defendants a hearing — with or without the opportunity for pre-hearing discovery — to test the verity of Plaintiffs' allegations.

B. Plaintiffs' Petition Rests on Factual Allegations Requiring a Hearing

Plaintiffs acknowledge that Mr. Smith's alleged mental breakdown was central to their Petition to Open and the Trial Court's decision to open the final un-appealed judgments. *See* Resps.' Brief at 21. The Trial Court accepted Plaintiff's theory of Mr. Smith's mental impairment based solely on the documentary evidence that Mr. Beasley presented: Mr. Beasley's affidavit, affidavits of Mr. Beasley's employees, a letter from a psychiatrist who allegedly examined Mr. Smith, copies of Mr. Smith's correspondence, and the docket reports from the underlying cases. *See* 7a-10a. Glaringly absent was any statement by Mr. Smith himself.

With only the self-serving documentary evidence presented by Mr. Beasley, Plaintiffs still maintain that Mr. Smith's purported breakdown is an undeniable fact not susceptible of refutation:

> [T]here really could be **no genuine dispute** that the underlying reason for the documented pattern of extreme dereliction and fraud in this matter lay in an impairment suffered by Mr. Smith. This was not only shown by the psychiatric evaluation of record, **but by common sense. It is simply obvious that** a lawyer with Mr. Smith's decades of experience **would have known that** . . . [his malpractice would lead to] the destruction of his career. **It is self-evident that** something in his mind **must have been** gravely amiss . . . .

Resps.' Brief at 20-21. (emphasis added).

Although Plaintiffs claim that it is "common sense" and "self-evident" that Mr. Smith suffered mental impairment, no fact-finder ever observed the demeanor of Mr. Beasley, his employees, the psychiatrist, or Mr. Smith. No defendant ever had the opportunity test the credibility of Mr. Beasley, his employees, the psychiatrist, or Mr. Smith through cross-examination. Without a credibility determination at a minimum, evidence like this, that is testimonial in nature, cannot support a fact finding under Pennsylvania law. *See Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932) (self-serving affidavits do not establish the absence of a genuine issue of material fact).

Plaintiffs' additional claim that the Trial Court relied on simply the "pattern of professional dereliction" as reflected in the dockets — separate and distinct from Mr. Smith's mental state — rings hollow. The docket reports alone do not justify relief. Under Pennsylvania law, attorney mistake, oversight, or neglect, without more, does not constitute the extraordinary cause required to open final un-appealed judgments. *See, e.g., Simpson v. Allstate Ins. Co.*, 350 Pa. Super. 239, 504 A.2d 335 (1986) (en banc) (unexplained oversight of counsel does not justify opening final un-appealed judgment).

Without Mr. Beasley's affidavit to provide an explanation for Mr. Smith's inaction, the dockets alone do not support an inference of anything more than mere attorney mistake, oversight, or neglect, which does not justify relief. Indeed, in the three cases involved here, the dockets support the equally likely inference that Mr. Smith was simply *unable* to obtain favorable expert testimony and, therefore, had no choice but to suffer summary judgment.[1]

In the end, Plaintiffs' arguments appear to be designed solely to divert this Court's attention from the fundamental due process question at issue in this case: Did the Trial Court deprive Defendants of their rights to procedural due process by opening final un-appealed judgments, based on the self-serving paper record presented by Plaintiffs' counsel, without affording Defendants the opportunity to present evidence and cross-examine adverse witnesses? The absence of any testimony from Mr. Smith himself speaks volumes about the unfairness of the Trial Court's decision. When the Trial Court's decision to open final un-appealed judgments turned on questions of fact, the denial of fact-finding proceedings unconstitutionally deprived Defendants of all opportunity to protect their property rights. It is imperative for this Court to reaffirm the right to be heard in one's defense.

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1. Plaintiffs further misleadingly argue that Defendants have failed to prove prejudice. It was, however, Plaintiffs' burden, as the petitioning party seeking to open final un-appealed judgments, to establish a lack of prejudice to Defendants. *See, e.g., Lewis v. Reid*, 244 Pa. Super. 76, 82-85, 366 A.2d 923, 926-27 (1976) (Majority and Concurring Opinions), *aff'd on rearg.*, 244 Pa. Super. 599, 371 A.2d 872 (1976). In any event, Defendants never had an opportunity to present evidence to establish prejudice due to the Trial Court's refusal to conduct an evidentiary hearing.

III. Plaintiffs' Request for Sanctions Is Frivolous

For the foregoing reasons, Defendants, in good faith, request a grant of a Writ of Certiorari to the Trial Court. Plaintiffs' intemperate arguments for sanctions are frivolous and do not warrant favorable consideration by this Court.

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